United States Court of Appeals
for the Second Circuit

APPENDIX

76-7476

United States Court of Appeals

For The Second Circuit

No. 76-7476

B

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

JOINT APPENDIX—TRIAL TRANSCRIPT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWBURGER, LOEB & CO., INC., as
assignee of claims of DAVID BUCKLEY
and MARY BUCKLEY,

Plaintiffs.

vs.

CHARLES GROOS, MABEL BLEICH and
GROSS & CO.,

Defendants,

vs.

NEWBURGER, LOEB & CO., a NEW YORK
LIMITED PARTNERSHIP, ANDREW M.
NEWBURGER, LEO STERN, ROBERT L.
STERN, ET AL.,

Additional
Defendants on
Counterclaims.

---------------------------------------x

Before:
HON. RICHARD OWEN,
District Judge

71 CIVIL 685

New York, June 16,17,18,19,20, 1975

STENOGRAPHER'S MINUTES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-- x

Newburger, Loeb & Company, Inc., as assignee of claims of David Buckley and Mary Buckley, :

Plaintiffs, :

vs. :

Charles Gross, Mabel Bleich and Gross & Company, :

Defendants :

-and- :

Newburger, Loeb & Company, a New York Limited Partnership, Andrew M. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank, Ales Aixala, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky, Finley, Kumble, Underberg, Persky & Roth, a Partnership and Lawrence J. Berkowitz, :

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Additional Defendants
on Counterclaims. :

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Before:

HON. RICHARD OWEN,
District Judge

New York, June 16, 1975
Room 619 - 10:30 a.m.

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- - -

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THE COURT: Mr. Grutman.

MR. GRUTMAN: Your Honor, I notice that there remains but thirty minutes before what would be our customary luncheon recess. Each of the predecessor counsel have had the advantage of delivering their opening remarks in an integrated fashion and I would consider it something of a hardship if my remarks, which will be longer than 35 minutes, were to be interrupted, so I would request that we recess for lunch now.

THE COURT: The problem is I have a luncheon appointment which I fear conflicts with that. May I ask you to start.

MR. GRUTMAN: Yes, your Honor.

THE COURT: I will permit you in the manner of a serial writer of a magazine to do a brief recapitulation after lunch.

MR. GRUTMAN: Very well, your Honor.

May it please the Court, Judge Owen, learned counsel, Mr. Foreman and each of you ladies and gentlemen of the jury:

My name, as you know, is Roy Grutman and I am a member of the firm of Finley, Kumble, Hiney, Underberg and Grutman, the lawyers who are being sued in this case and who were the brunt and object of the tirade of vituperation that

Mr. Mandel visited upon us in what he called his opening remarks.

I take this opportunity to rise on behalf of my firm and to tell you that we will demonstrate to you that there was no conspiracy. There was no fraud and we owe no obligation whatsoever to the faithless, perfidious collection of greedy people who have attempted in what they call a roadmap to stand logic and reason on its head and turn the world upside down.

If an opening statement can be called the picture onthe jigsaw puzzle box, when you have heard the proof, the jumbled pieces that Mr. Mandel distorted for you will emerge in their true configuration and you will see that there was no conspiracy, there was no fraud and I dare say that you will findthat those people represent articulately in the person of Mr. Gross the most consummate instrument of greed, perfidy, treachery and dishonesty. Those are harsh words, but the facts compel me to say that you will conclude nothing else.

Is it odd that Mr. Mandel, in the two hours that he spoke to you, could not account for one reason as to why the world at large, 21 partners, six limited partners and nine subordinated lenders looked to that man as the instrume which had brought them to grief. Why? Not one word about why a man painted to you as though he were a saint, a saviour and an innocent victim.

In fact, Mr. Foreman and ladies and gentlemen, that man by arrogance treated the firm into which he came in 1969 like some feudal fiefdom, arrogated to himself what he thought was his right to run that proud and prestigious brokerage house into insolvency.

Not simply that these were bad business judgments. These were judgments born out of Charles Gross' ego, unwilli ness and irresponsibility to share with his other partners the misjudgments that he made and, after having made them, concealed, denied and misled them to ruin.

On November 17, 1970 a letter from the Stock Exchange was sent to Newburger, Loeb. Take notice that if in 72 hours you have not been able to bring your excess capital into line with the Stock Exchange requirements, you die. It is over. It is finished. You are out of business, suspended.

That was the letter. It will be exhibited, No. 1.

How did this come about, Mr. Foreman, ladies and gentlemen? Some of you indicated that the name Newburger, Loeb was known to you, although your experiences in the world of securities were limited. Yes, it is a proud name. A name that was born in 1899 when the Newburger brothers in the eorm 43

world of Wall Street that was still filled with runners, trolley cars, horses and messengers founded what was to become Newburger, Loeb.

In 70 years that small firm had risen to the point where it was a great firm. It had survived the panic of 1908. It had survived Black Monday in 1929. It had weathere the depression. It had overcome all kinds of financial difficulties because it was led by men of character, men of judgment, men of honesty, men of trust, men of faith.

The one thing Newburger, Loeb couldn't survive was Charlie Gross. And you will see that from the facts.

In 1967 that firm stood at the pinnacle of its accomplishments. Revenues of $14,500,000 and a profit to the general and limited partners of over two and a half million dollars.

On November 17, 1970, after a regime of Charlie Gross, the proud edifice of Newburger, Loeb lay in rubble. His $800,000 contribution was just a bagatelle in comparison to the enormous ruin which he had wreaked upon Newburger, Loeb.

And I say this to you not because Charlie Gross exercised bad judgment, but because Charlie Gross was irresponsible and Charlie Gross was dishonest.

There were limitations. This was not a feudal fiefdom. Charlie Gross had no right to take the money of his partners and secretly gamble with it in Wall Street and he did that and we will show it to you and the loss that Newburger, Loeb sustained was $148,000.

Charlie Gross knew but concealed that what is called the back office loss, the back office loss was $2 million. Under his suzerainty and leadership $2 million. He never told any of the other partners or the limited partners and with knowledge of this embarked on a program of lavish expenditures. Opened an office in California.

Brought in because he was, and there will be no doubt about this, the most dominant, overbearing personality who ran that firm, brought in a sub-standard broker with shady connections that cost the firm $80,000. He knew that that man was unworthy and yet he brought him into the firm and the loss there was $80,000.

Under his stewardship Charles Gross filed with the Stock Exchange false reports. Yes, false reports. That is a serious thing because in Wall Street they insist on integrity, a quality singularly lacking in Mr. Gross.

He filed those false reports and when they were found out the firm was fined $50,000, which I think was a record for the kind of wrong which had been committed by Charles Gross.

At the same time that he was not disclosing to his partners and yet was exercising the role of managing partner, managing partner, Mr. Foreman and ladies and gentlemen, is a very specual function. It means that you have a trusteeship relationship with the highest punctilio of obligation and faithfulness and bona fides is owed to the people whom you serve.

Charles Gross dishonored that obligation and he led his partners with a $2 million back office loss into taking a lease at 1 New York Plaza, an enormous building put up by Sol Atlas for $6 million, at a time when the fortunes of the firm were being eroded, when its capital had declined from the $8 million level in 1967 to $4 million to the point where, as I say in November of 1970, it was below $2 million.

All of that, those are the glories of Charles Gross and they were all wrong things to do.

What happened was suddenly when the Stock Exchange announced that the tumbrels were rolling and that the demise of Newburger, Loeb was at hand, people woke up. People became aware of the debacle that this man had made of their company. It wasn't Finley, Kumble. It wasn't any of the people at this table.

I tell you, mark my words, the proof will be here, it was 17 different law firms and some of them the most distinguished in the United States from lawyers whose reputations are international who participated in the "Save Newberger, Loeb" operation. They all met at these meetings and the memoranda will be here. Thank God six years after the event almost we are not going to have to rely on fading recollection, but the documents. The documents which don't die, which don't lie and which don't go away and which will tell you, it wasn't any of the people whom Mr. Gross blackened with his brush. It wasn't we who said what he had done, but other lawyers representing limited partners and subordinated lenders who had rights superior to Mr. Gross who pointed out that Gross was liable to Newburger, Loeb for more [illegible] a million dollars in damages.

Does that sound like a conspiracy originated by Finley, Kumble, by Risher, by Muh, by Kayne, by Newberger's, by Stern's, not at all.

When the figures are trotted out you will see, as Mr. Shaw explained yesterday, in the structure of a partnership an organization of people joined together for profit there is a gradation of who has superior rights when claims are made.

First come the subordinated lenders. The people who are not general partners, but who have simply loaned money to the company.

After them come the limited partners and then in the end come the general partners and with the shriveled remnants of what remained it was the subordinated lenders and the limited partners who recognized that the general partners, including those who may have had technical positive cash positions for capital on the books, they were really gone. The money that had to be preserved belonged to the limited partners and to the subordinated lenders and it was they who assessed the situation and pointed out the wrong of Charles Gross.

I tell you, you will hear out of the lips of a man who, I dare say, holds a reputation as a leader of his corporate bar not exceeded by anyone, condemn Charles Gross, condemed him in that great aphorism of Wall Street, the bulls make money, the bears make money, butnot the pigs. Right there in the record you will see that they called Charles Gross a pig.

You will, when you have heard this evidence, come to no different conclusion because, you see, what Charlie Gross had done knowing secretly how what he had tried to do for the firm had come to ruin, he became a partner in 1969 in January, he became the managing partner in July and between July of 1969 until August of 1970 he recognized that the eorm 48

worsening situation of the firm caused by him meant he, he Charlie, Charlie had to get out. The captain of the ship you will see was building himself a private raft to get off and let the rest of them go drown.

So Charlie broke his word. What is a lie to Charlie? He promised he wasn't going to resign from the partnership until December of 1970, but as he watched the dwindling fortunes of Newburger, Loeb, he served notice, he was out in August of 1970 and what was the effect of that.

The effect of it was that as of September 1970 Charlie Gross had quietly in the stillness of the night gone overboard. He was no longer a general partner.

That meant that whatever capital he had and his net worth was no longer at risk. Not so for Leo Stern. If Charlie had $129,000 in the firm of 300, as his lawyer claims, Leo Stern had $600,000 in the firm and he was staying on with his other colleagues, but when Charlie went over the side, you see, and was no longer a general partner, he knew that because of the losses which had been suffered by the firm, there were going to be enormous tax refunds which would be repaid to the general partners.

Having withdrawn from the firm and exempted himself and his private net worth from the obligations of the firm, the $400,000 which Charlie Gross was going to get as a tax refund couldn't be reached by the firm, but could be used by Charlie. That is the loyal leader of Newburger, Loeb. That is the splendid man that Mr. Mandel calls an innocent victim whom all these people ganged up on.

Charlie Gross went over the side. That was only an act of cowardice. But it was much worse than that because, you see, what was going on was a conscientious effort by sincerely motivated people to save Newburger, Loeb and it was worth saving. There were people, not just Charlie and Mrs. Donoghue, who is his sister, and Mable Breich, the old family retainer, there were people who had their life savings, their lives were in that company and had a tradition in that company and pride in that company that stretched back for generations, and there were people who were trying to save it. But in that there were conflicting interests.

The general partners, the limited partners, the subordinated lenders and even as between husbands and wives there were conflicts. What had to be done with those conflicts? I will tell you what had to be done.

What had to be done was to find a solution, a common denominator, a method that was fair, fair to all, reasonable, rational in light of the circumstances. It was an arm's length negotiation.

Here you are going to see the lawyering. The corm 50

lawyering that went on and that was presided over if by any one organization, as the ridgepole to hold up the tent or the linchpin for the chain, it was the Finley, Kumble firm. You are going to find out about lawyers and lawyering in this case, ladies and gentlemen.

THE COURT: Would this be as good a place as any?

MR. GRUTMAN: Not just yet, Judge, if I may.

THE COURT: Tell me when.

MR. GRUTMAN: You are going to find out that the law is not just the laborious study of a dry and technical system. It is not just the practicing of shopkeepers' arts and the greedy watch for clients and the participation in the mannerless and often violent conflicts over sordid interests.

I think that I will tell you on behalf of my law firm that you will find from the evidence that Robert Persky, the partner in our firm at the time who was chief of our corporate section, drank the cup of heroism in this, wore out his heart after the unattainable, set his course by a star that he had not yet seen and was worthy of the highest traditions of lawyering because what he sought to do, what was right and fair, he helped people in trouble. All of those people with the exception of Gross who were pledging to themselves their lives, their fortunes and their sacred eorm 50a

honor, except Mr. Gross, who as I will detail for you fact by fact, was a man utterly without honor.

THE COURT: Very good, ladies and gentlemen, we will stand in recess until 2 o'clock.

(Luncheon recess)

AFTERNOON SESSION

2.00 P.M.

(In open court, jury present.)

MR. GRUTMAN: Shall I resume, your Honor?

THE COURT: Please do.

MR. GRUTMAN: Ladies and gentlemen, I think, before we recessed, I was trying to explain to you the creative role that was played in bringing together all of thes disparate elements by our law firm, because there was a natural antagonism between the interests of those people who were again partners, those who were limited partners, and those who were subordinated lenders.

Between that time, in November of 1970, when the Stock Exchange death knell letter awakened everyone to the true situation that confronted Newburger, Loeb, between that time and February 11, 1971 there were hectic, continuous meetings, consultations, conferences, exchanges of memoranda and efforts made, primarily by Finley, Kumble, as the central law firm trying to unify this transaction to meet the emerging exigencies which confronted the solution to the problem.

To recapitulate briefly, apart from the ruinous cash flow drain that was imposed on the firm by Mr. Gross deciding that besides the securities market Newburger should create a subsidiary called New Loeb Sports and sponsor a basketball team called Buffalo Bills at $1,300,000, costing $10,000 a month in loans and payments that could not readily have been met by the firm, besides the drain on the back office, despite the ruinous leases and the lavish extravaganzas of opening offices in California, which the Stock Exchange prohibited, despite the erosion of the capital in the firm, which had risen so alarmingly that the Stock Exchange had placed restrictions on the activities of the number of trades that Newburger, Loeb would be permitted to be engaged in, a solution to be found.

Some people say that a Harvard lawyer is a fellow who always tells you why something cannot be done. We at Finley, Kumble believed that there is a solution, an honest solution which ingenuity and adaptation and hard work can help find.

What couldn't be found up until the time that Finley, Kumble was involved was where would new money come from. The Stock Exchange had made it abundantly plain: Either you get an infusion of capital or your doors will be closed.

Efforts had been made by the general partners, unavailingly, to find new sources of capital. As a matter of fact, you will find, in the Executive Committee minutes of Newburger, Loeb, repeated references going as far back as the middle of 1969 by Charlie Gross that Newburger Loeb's solution would be to convert the partnership into a corporation.

There are many significant legal differences between the liabilities that attach to people who are partners and the limited liability which obtains in a corporation. There had been a trend afoot in the stock market in which any number of very prominent firms had converted themselves from partnerships into corporations, and that was a suggestion which originated with Mr. Gross. It was a suggestion which was implanted in the mind of a man named Fred Kayne. You have heard him nentioned by Mr. Mandel.

Kayne was euchered by Mr. Gross into making an investment in Newburger, Loeb and becoming a partner. Gross did not represent to him the true state of the profit and loss of the company, the enormous problems in the back office and its poor profitability, but he got him and other people to come into the company.

And Kayne was an energetic, ambitious and capable man, and he was brought in and brought to New York to help take over to meet some of the problems which Newburger, Loeb was confronting.

It was Kayne who engaged the consulting firm of Risher & Muh, two defendants in the case, two young men who had devoted their careers and put their reputations on the line when they went to work for Newburger, Loeb.

You will find that these men are not Johnny-come-latelys come to fish in troubled waters; they are not some brigands looking for some opportunity to rape a corporation or loot it. They were men with distinguished careers, outstanding academic backgrounds, and who had come from the internationally famous consulting firm of MacKenzie & Company.

What they did was to roll up their sleeves and go to work to try to find out what was wrong with Newburger, Loeb.

I am not in the cinema business, like Mr. Mandel, w ho talks about flashbacks and the like. That may work in the movies. But when you put the true chronology on a continuous running film and try to put Finley, Kumble's relationship to it, you will find the flaw in Mr. Mandel's argument.

When these things I am talking about were taking place, Finley, Kumble never heard of Newburger, Loeb as a client. We never had a thing to do with them and they never had a thing to do with us. But Kayne brought Risher and Muh in. Gross was still the managing partner, and Risher and Muh started to deal with the problems that they had, to staunch the flow of outgo of capital of Newburger, Loeb.

One of them went up to Buffalo to see if they could sell off the basketball team. Another was concerned with the problems of the lease which Mr. Gross so improvidently engotiated with Mr. Atlas, $6 million over twenty years, and they needed that like a hole in the head.

There may very well be evidence in the case reflecting quintessentially the kind of thing Mr. Gross would do. There was a volatile real estate market. That $6 million lease was offered to be bought back from Newburger, Loeb by the landlord at a profit to Newburger, Loeb of $100,000. In other words, the landlord thought it more advantageous to him economically to rerent the space for the term that it had been let to Newburger, Loeb to another tenant and would pay Newburger, Loeb a hundred thousand dollars to get out of the lease.

Mr. Gross, when that offer was made, in spite of the shrinking finances of Newburger, Loeb, with great bravado rejected it and never told anybody else about it.

What happened was, Finley, Kumble was called in to deal with this problem. We were called in because part of the expertise of our firm, and we are nearly sixty lawyers strong now, we have traditionally been a law firm with great expertise in the real estate market, real estate problems and real estate dealings, and it was that department of our law firm that was first consulted to consider what we could do, because the hundred thousand dollar offer that had been made and rejected by Mr. Gross was no longer on the table. What was on the table was a continuing obligation to pay $6 million that Newburger, Loeb didn't have.

So Neil Underberg, the head of our real estate department, negotiated with the firm of Reavis & McGrath, who represented Sol Atlas, the owner of the building, and we were able to negotiate the best settlement possible, and that was for Newburger, Loeb to buy out of a $6 million obligation by paying $430,000 to Mr. Atlas for space which Newburger, Loeb never occupied and couldn't have afforded. That little item was a $530,000 loss - thank you, Mr. Gross.

But that was Finley, Kumble's first involvement with Newburger, Loeb. That took place in the latter part, the very latter part, of August or early September. You will see, however, and the document will be there for you to read, that before Finley, Kumble was ever consulted or engaged, there was an extraordinary meeting of the partners of Newburger, Loeb and it was convened by Mr. Fred Kayne, and it was based upon a report that Messrs. Risher and Muh had prepared as of August 21, 1970.

That meeting did not have minutes simply prepared by a secretary. It was a meeting in which the words of Mr. Kayne were taken down by a court reporter. And what that meeting contained was a condemnation of the stewardship of Charles Gross, an indictment, an accusation of all of his wrongs, his misdeeds, his frauds and his dishonesty. And all of those complaints and all of those claims, which Mr. Mandel said he wouldn't dignify with answering because they were a smear, were collectively responsible for the staggering and crippling losses economically which had brought Newburger, Loeb to its knees.

And they were something with which, up to that point, our law firm hadn't the slightest connection. But you will see those claims, they are in black and white, and those are the same claims which Newburger, Loeb, as plaintiff, asserts against Gross, Bleich and Donoghue, but primarily as aginst Mr. Gross.

After our law firm was consulted relating to the --

MR. MANDEL: Excuse me, your Honor. I have been quite patient. But the last statement is clearly a misstatement of the pleadings. There is no claim asserted here against Bleich and Donoghue except the Buckley claim, and there is no way it could be done. I haven't quarreled --

MR. GRUTMAN: The point is well taken. I would rather not be interrupted. Mr. Mandel is correct as far as it goes.

The claim against Bleich and Donoghue is only for the $378,000 loss by Newburger, Loeb as a result of the churning by Gross & Company. That is the number. This isn't a bagatelle. They werent' brought in here simply because of somebody'e whim. They were partners in Gross & Company.

The Court will tell you what their responsibility as partners in Gross & Company entailed, what liabilities attach to them, because, you see, one partner in a firm pledges the credit and worth of all of his other partners. And they were partners in Gross & Company, and it was Gross & Company, as the brokerage house which handled the Buckley account -- get this: They cost Newburger, Loeb, as the clearing house, $378,000 real money.

That is why they are here in the case. $378,000 is a staggering amount of money in anybody's concept. But that is only as much as they, together with Charles Gross, are responsible for.

Mr. Gross in his own right is responsible for well over a million dollars worth of loss which he cost Newburger, Loeb after he came to Newburger, Loeb as a partner in 1969.

But, as I was saying, our law firm, as lawyers, first dealt with Kayne, arraning for the payout of the

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obligations on this extravagant lease that Mr. Gross had negotiated with Atlas at the One New York Plaza premises.

Subsequent to that, because the people at Newburger, Loeb were satisfied with the energy that we brought to bear and the results given the problems that we faced, that we were able to accomplish, again consulted us to attempt to conserve the firm's capital by arranging a clearing house agreement where Newburger, Loeb would withdraw as a clearing firm with the Stock Exchange and arrange for that business to be performed on its behalf by another firm.

We negotiated that. Various other people in our law firm negotiated the best kind of a clearing agreement that we could with W. E. Hutton & Co. By being able to do that, we were able to give a smaller exposure to Newburger, Loeb on the requirements that they would have to meet to maintain excess capital according to the requirements of the Stock Exchange.

We were then brought closer and closer into the involvement with our clients at that time and we were asked to see what we could do to help meet the principal problem of the firm, which was where can additional capital come from, and Fred Kayne, who had succeeded Charles Gross -- since Mr. Gross resigned right after the meeting in which Kayne, who was getting to close to Gross' toe nails, put the wood to him and made the accusations which that speech contained.

And so Mr. Persky attempted to use his creative abilities, to use the resources of our firm, of the clients and the people that we knew or with whom we had legitimate associations, and Mr. Persky was able to find a man, whose name has been mentioned once, whose name is Angel Aixala, known as Alec Aixale.

Mr. Aixala is married to one of the Baccardi heiresses, and Mr. Aixala had a million dollars worth of Baccardi stock which he was willing to put into the reorganized Newburger, Loeb as subordinated debt.

Whatever subordinated debt may mean as an accounting or a capital concept, it meant new life to Newburger, Loeb; it meant the difference between closing its doors or staying in business. It made all the difference in the world.

And so Mr. Persky brought that to the attention of Mr. Kayne, Mr. Risher and Mr. Muh, to the general partners, and in arms length negotiations and in conferences, which were laboriously worked out between people trying to deal fairly with each other, a formula was finally struck by which the Newburger, Loeb partnership, this failing, moribund, cash poor entity, would be able to comply with the requirements of the Stock Exchange, reconstitute itself and give itself fairly a new lease on life.

The alternative simply of not making a deal was that Newburger, Loeb was finished, and worse. The people in Newburger, Loeb, all the general partners and all the limited partners, would be wiped out, clean. That was the choice. That's it: bankruptcy, nothing left.

Remember, as I told you, the way by which people are paid. First you pay the creditors, the employees, and the first people to get satisfied are the subordinated lenders, before you reach the limited partners, and lastly the general partners. For the economic reality is, as reported by Peat, Marwick, Mitchell - those were the auditors of the firm - on the financials as they knew them to exist, they were facing the ineluctable fact that the drain week by week was leaching away the strength from Newburger, Loeb; they would all have gone bankrupt.

So various meetings were held. The subordinated lenders insisted on one thing, the limited partners insisted on another thing. But one thing they were all unanimously agreed upon, these twenty one partners, these nine limited partners and six subordinated lenders: If there was going to be a reorganization, the only way in which that reorganization could work, with the million dollars that was being put in by Mr. Aixala, would be if nobody took cash out of the business.

It meant that everybody had to take paper, had to express a vote of confidence in their combined going forward together. The money there was the subordinated lenders'. They pledged that they would continue to keep their money in the corporation for a given length of time.

The limited partners received a certain class of stock and the general partners received another kind of stock, and this formula was worked out as a business proposition in the climate of the exigencies of what they confronted.

There were any number of general partners whose capital accounts were in deficit but who were going to receive tax refunds. Only Mr. Gross had leaped over the side, so his tax refund belonged to him. But, as to the other partners, they pledged that they would give their tax refund back to the corporation in satisfaction of a portion of their obligation.

Mr. Mandel sinisterly suggested that there was some kind of a bribe offered to some partners who had capital deficits and who were forgiven a portion of their indebtedness. That was no bribe. That was just a commercial reality worked out among all of the people involved in resolving their conflicting interests, to find a fair solution by which the deal could be made to work.

The deal was made to work, and an agreement was hammered out, not in a corner or in the dark, not in some kind of secret conspiracy, but in broad daylight, and Mr. Mandel knew everything that was going on, was invited to the meetings, was on the distribution list, received copies of all the drafts, and was in constant telephone contact with Mr. Persky and the other lawyers.

On December 31st, an agreement had to be presented to the Stock Exchange representing what would be an agreement or a plan or otherwise the door would be closed, because the door, which was to have been shut on November 20th, was kept open by guess who? By Samuel Persky, who kept saying, "A little while longer and we will have it worked out. A little while longer and we will have it worked out."

He did that four times, but the Stock Exchange finally said, "Listen. Fish or cut bait. Give us a plan by December 31st or that's it." And so a plan was worked out by December 31st, and that plan, you will see, because the document is here and it is signed by everyone - everybody, that is, who could vote.

Focus on this, if you will, because it is a little subtle, and for lay people it may be somewhat difficult to follow. But it is very telling and very significant.

You will recall that I mentioned that Mr. Gross had withdrawn as a general partner by serving his notice on August 30th, effective September 30th, 1970. The good thing for Mr. Gross in that respect was that it meant that his capital, his net worth capital, that is, was no longer at risk and all that he had in the firm was the capital which remained in the firm, and that was $129,000, according to Peat, Marwick, Mitchell.

But, by withdrawing, by going over the side, he cut himself off from the partnership, no longer had a right to express a vote or a voice in the affairs of the partnership. That meant that this former general partner, this former managing general partner, could not vote to object to the plan, because that is written in the partnership agreement, and the partnership agreement was written by the law firm that Charlie Gross brought in to represent Newburger, Loeb. And if the agreement is to have any vitality and any meaning, it is clear to Charlie.

But Charlie had something else going for him, because he is a very resourceful fellow. He had his sister over there in Australia, you understand, down under, Mrs. Donoghue. She knew no more about what was going on in Newburger, Loeb than an eskimo. But blood is thicker than water. I didn't say that. Mandel said it. Mandel said it. You will see it in the document.

Those were his words, "Blood is thicker than water." And you bet it was, and Charlie was going to use it for all that it was worth. Not only did he have that, but he had another stalking horse; he had Mabel Bleich, Mabel the old family retainer, Mabel the pawn, Mabel whom he could make turn on and turn off at his wish or his whim. So Charlie used them.

THE COURT: You are waxing the frame of a summation.

MR. GRUTMAN: Sorry, your Honor.

What he did was he began a conspiracy of his own. Ostensibly, Golenbock & Barell - that is a law firm that you will hear about, who were his lawyers - became the lawyers for Mabel Bleich and Geanne Donoghue, and Golenbock & Barell obtained for him Mr. Golenbock's classmate, close friend and business associate, Phil Mandel, to ostensibly represent the independent interest of Charles Gross.

It looks like rectitude, doesn't it? It looks like fairness. Let me tell you what happened, and this is going to be the fact on which they will choke.

That agreement of December 31, 1970 was signed by all of the general partners who could vote, all of those who were entitled to vote. It was signed by, except for

Golenbock & Barell's clients, all the limited partners, all the subordinated lenders. And what do you think Golenbock & Barell did? Mabel Bleich signed, signed before Charlie got to her, she signed the agreement, approved it.

And Golenbock & Barell, through their partner, Arthur Silverman -- and the document is there in black and white, and you can turn it upside down. It says, "We cannot sign for Mrs. Donoghue. We don't have a power of attorney. But we recommend that she sign because the agreement is in her best interests." And it was.

But it wasn't in Charlie Gross' best interests, because what you will see in the diary records made by these lawyers is that there is a light motif: Charlie Gross must have cash, must have cash, must have cash - the only one: I must have ca[illegible]

Ironic, isn't it? The man that had brought them to their ruin was demanding ransom and tribute as a reward for his misdeeds. And he got it to the point where even Mandel made a recommendation to Charlie Gross --

THE COURT: Mr. Grutman.

(Pause)

MR. GRUTMAN: Charlie Gross had a recommendation by his lawyer that he accept the agreement, just as Bleich had signed the agreement on December 31st. Thereafter Mr.

Gross went to work, and the following took place:

The agreement had to be worked out in its details by February 11th. Miss Bleich, she was sequestered; and that didn't happen accidentally: because, if there was a conspiracy, it was being run by Mr. Gross. Mrs. Donoghue, for reasons of her own, as the documents recite, decided that she waan't going to sign.

The papers were being prepared. We were coming up to the edge: There would be no more delays, no more postponements; that deal had to close on the night of February 11th or it was finished.

Mr. Mandel told you something which I can't believe he really believed when he said it. Up until the night of the closing, no one, no one in Finley, Kumble, and not one of those seventeen other law firms, had the slightest intimation that the firm of Rosenman, Colin, Kaye, Petschek, Emil & Freund, who had been retained by the partnership as special counsel to act on behalf of the partnership at the closing on February 11th, was going to withhold giving an opinion that it was a proper thing for the partnership to have transferred its assets to Newburger, Loeb, the corporation.

When, as the shadows fell and the evening was coming to that point where that opinion had to be given, it came as a bombshell when Mr. Burak, he didn't refuse to give it; he simply demurred. Mr. Burak was a younger partner. He was not the man in charge of the case. The man in charge of the case was another lawyer, named Max Freund. He was not in attendance that evening.

And when Burak, for whatever reasons, whatever ambivalence or whatever reticence he had, didn't give the opinion, it wasn't Bob Persky leaping up as a conspirator to change hats; but there will be lawyers here, whose testimony you will not doubt, who will tell you that in the circumstances of what happened, these other lawyers said, "Has anyone considered this problem?" and Finley, Kumble had considered the problem and, because we had, we were asked by the other lawyers to see if we could draft an opinion. And so Mr. Persky and Mr. Bamberger --

By the way, these are not men of some small accomplishment. Mr. Persky is a former judge's law secretary. Mr. Bamberger is Harvard Law Review, 13th in his class. They drew up, that night, an opinion letter, and that opinion letter was circulated among all of the lawyers and the clients who were present, all of them, and after they read it, every client signed and every lawyer approved, including - guess who - Mr. Burak, on behalf of his client.

The choice was very simple. In the background there lurked Mr. Mandel. Mr. Mandel, on behalf of his clients, had been playing a holdup game with us. He kept contending that the agreement, which was going forward on February 11th, couldn't go forward unless Charlie Gross' demands were met, expressed "unless you get Geanne Donoghue's signature and Mabel's signature, make peace with Charlie and the other signatures will be supplied." That is how simple it was.

But what it really was was a game of extortion. They wanted money or no signature. We didn't want any lawsuits, we didn't want any disputes, and the documents will show you the efforts that were made, led by Mr. Persky, rallying around him the other lawyers and the principals to find some solution, to placate, to allay or to mollify Mr. Gross and his lawyer. But they stood in the doorway and what they were saying was, "Money or your life," asserting it's not legal.

Finley, Kumble said, "If you think this is improper, and we have shown it all to you, we have circulated it, we have displayed it to everybody, if you think it is illegal, go down to the courthouse and get a temporary restraining order. Test it out legally. Let's do it in the open. Let'd do it beforehand." But, oh, no. They preferred to lay in the tall grass and let the deal go through and have the chips fall where they may.

The Stock Exchange, ladies and gentlemen, approved the deal. The Stock Exchange approved the transfer agreement without Geanne Donoghue's signature and without Mabel Bleich's signature, and certainly, of course, without the signature of Mr. Gross, who had no voice at all.

What we were trying to do, as I say, was to settle, make peace, draw everybody together, put down your swords, go to work constructively, yield, compromise. Gross would not be compromised with and it became plain that, however much we would try to avoid it, litigation was going to be inevitable.

The claim that Charlie Gross was going to be tied up in litigation for years was not the words of Finley, Kumble or Bob Persky. They were the words of Arthur Richenthal, they were the words of Robert Steifle, and they were the words of other lawyers who had been designated as a triumvirate of lawyers to represent the limited partners and subordinated lenders.

It wasn't a tool that we were looking for. But when Mr. Persky, as a lawyer representing Newburger, Loeb, became acquainted with certain facts, it was his bounden duty, his solemn obligation to cerve his client. And that brings us to the Buckley affair.

David and Mary Buckley were a husband and wife. David Buckley became a customer of Charles Jordan. Charles Jordan was a man who sat with a green eye shade and spoke into three telephones simultaneously, and he looked like something straight out of The Sting. But he was a broker and he had an office across the street from where Mr. Buckley worked as a junior executive at Lever Brothers.

I think he was making, the evidence will show, about $19,000 a year. Mr. Buckley will testify that when he met Mr. Jordan, Jordan never bothered to learn who his customer was. That "know your customer" is a phrase which has a special meaning of art in the business of the stock and securities business. It means that, if you find some nice little old lady who wants to put $9 million into pie in the sky, as a broker you are not supposed to do it if it is inappropriate, for as a broker you have a responsibility to see that people make judgments either on their own or on your recommendation which are commensurate with their ability to take risks and take losses.

Jordan never found out anything about the objectives of Mr. Buckley and Mr. Buckley never told him about how important or prominent his father was in the Georgia Pacific Company. There will be a lot of testimony about it, but the highlights are going to show this, and they will make your eyes reach for the ceiling.

This $19,000 a year executive - between 1962 and 1966, the total volume in purchases, for purchases and sales in this man's account, is slightly in excess of $9 million. The rate of turnover in that account exceeds enormously the permissible guidelines for a person in his circumstances, with his abilities and with his capabilities.

The commissions generated for Mr. Jordan, who was a partner in Gross & Company at the time they found this mark, were $75,000, a terrific thing for the broker. And the truth is that when Mr. Buckley first came into the clutches of Mr. Jordan and Gross & Company, he didn't have any big tax loss carryforward. He had an $11,000 tax loss. He didn't need to run up the kinds of losses that were created by Gross & Company.

You heard that Gross & Company, which wasn't a clearing house, cleared with Newburger, Loeb. That meant that what happened was Mr. Buckley would get a telephone call from Jordan: "Hello there. I've got a terrific stock. It's going right to the sky. Buy" 100, 200, 500, whatever it is. There were five or six such telephone calls almost every day to this executive at Lever Brothers.

What Mr. Buckley will tell you is that he had as much knowledge about the stock market and the ability to tell a broker yes or no as to tell your dentist either you want or don't want something, or your architect, your accountant or your doctor or your lawyer. He slavishly followed the recommendations given to him by Jordan except in those instances where Jordan intruded upon him for the umpteenth time.

Mr. Buckley was a man who had his own occupations and tribulations and was simply following what Jordan was telling him, because Jordan controlled him. One of the stocks in which Mr. Jordan put Mr. Buckley was this famous Westec stock.

In 1966 the stock, which had been bought between 3 and 11 or 14, or whatever it was, was at a high point and there was a seeming profit to be had in the stock. Mr. Buckley had been advised by people whom he knew that there was something fishy about that company, something standing by its financials. And so Mr. Buckley will tell you he called up Mr. Jordan three days before Westec was suspended and told Mr. Jordan, "Sell 14,000 shares. Sell me out. I've got a profit. Sell me out."

Jordan didn't sell, not because he forgot, Jordan being a partner of Mr. Gross, not because he was too busy, but because if Mr. Buckley's stock had been sold, it would have very seriously affected the 11,000 shares of stock held by Mr. Jordan in that company and the approximately 34,000 shares of stock in that same company held in long positions by other clients of his.

And so, in a clearcut conflict of interest, Jordan decided not to sell, costing Mr. Buckley at least $100,000 that he could have saved, and the stock got closed down.

Between the years of 1966 and 1970, Newburger, Loeb attempted to deal with the Buckley problem and there were some requests for payment. Payment was not made and ultimately Newburger, Loeb dealt with Mr. Buckley's lawyers and they were no less distinguished a firm than Mayor Lindsay's law firm, Webster, Sheffield, Hitchcock & Robinson. They are not connected with Finley, Kumble. We have never had any dealings with them, that I know of, before this matter and we had nothing to do with the Buckley case.

That law firm independently, not by any knee jerk reflex and not because their client told them to do it, made an investigation of the 1,100 transactions in the Buckley accounts - that's it: 1,100 buys and sells between 1962 and 1966, and this $9 million volume for a $19,000 a year executive.

Independently of Finley, Kumble, and without any collusion or coercion or any secret cooperation, they decided that was churning, that churning is a claim that they had against whoever was responsible for it.

At the time, and here's the subtlety, at the time that the Webster, Sheffield firm came to this conclusion, there was an arbitration that had been started by Newburger, Loeb against Mr. Buckley, and the reason for that is because Newburger, Loeb is the clearing house and had borne the loss in that stock.

Mr. Buckley's account was a margin account. Mr. Buckley was unable to pay for the stock, and so the loss that had been sustained when the stock was sold out was about $348,000 to Newburger, Loeb.

As I say, the claim was asserted by Webster, Sheffield on behalf of Mr. Buckley against Newburger, Loeb, the lawyers who were representing Newburger, Loeb at the time, Golenbock & Barell.

Whose lawyers were they? They were Charlie Gross' lawyers. He brought them in to the Newburger, Loeb account. And if they were to very zealously, steadfastly, independently and conscientiously have served the interests of Newburger, Loeb, they would have asserted, on behalf of Newburger, Loeb, the cross claim over against Gross & Company, since it was Gross & Company who was responsible for the loss in the first instance. They originated the account.

It was they who churned the account. Golenbock & Barell didn't do that because, in a clearcut conflict of interest, that law firm decided to serve its patron, Charlie Gross, rather than its client Newburger, Loeb.

When the Buckley case came into the hands of Finley, Kumble, Finley, Kumble had no conflict of interest. Finley, Kumble had only a conscientious desire, as honest lawyers, to serve our client, and our client was Newburger, Loeb. And we saw that claim the same way as Webster, Sheffield saw it, as a legitimate claim of substantial substance against Mr. Gross.

It was a claim, as I say. The loss was $348,000. The validity of that claim alone, independent of the other misdeeds of Mr. Gross which have come out of the woodwork, would have wiped out Mr. Gross' socalled capital as it stood in the firm, assuming that the firm's capital was to be judged on a going forward rather than a liquidation basis.

When we talk about the capital that remained in the firm as of the transfer agreement date, those calculations were made, ladies and gentlemen, on a socalled going business basis. That means when we calculated what would a partner or a withdrawn limited partner get out of the law firm -- not out of the law firm, out of the brokerage firm - it is on an assumption that the firm is going to be able to pay its employees, meet its obligations and, thus, pay out to people who it owes money. That is one concept, but it was utterly inapplicable to the facts as related to Newburger, Loeb.

On a going forward basis, Charles Gross had $129,000 in capital remaining in Newburger, Loeb, and Bleich and Donoghue each had $75,000 as limited partners. Those amounts would have been gone if the transfer agreement had not been signed, because we shall have evidence before you, expert testimony, that on a liquidation basis there would have been nothing for Gross and nothing for Bleich and Donoghue.

So, people who found the common denominator went forward. They did not knuckle under to the extortionate demands of Gross, Bleich and Donoghue, and Mr. Mandel did not stop the transaction from going forward.

For a time after Newburger, Loeb & Company, Inc. came into existence and was approved by the Stock Exchange, without the signatures of Bleich and Donoghue, it prospered and it seemed to thrive, not because of anything that Finley, Kumble did but because the people in there were able to deal with the economic situation as it prevailed in the market at the time.

Finley, Kumble still was dealing with a financially anemic client. The same cash deficiency that had made it necessary to go from partnership to corporate form made it necessary for our client to come to us six weeks after the transaction closed and say, "We appreciate what you have done for us, but we are unable to pay your reasonable fees in cash. Would you be willing to accept a portion of your compensation in stock in our company?" And we said yes because, you see, the relationship between a client and an attorney is really a relationship of mutual trust and confidence.

We didn't have to do that. But we did it because we wanted our client to know that we trusted them in the way that we wanted them to trust us. It wasn't a bribe. It wasn't previously agreed upon that we would receive stock. And the fact of the matter is that stock is now worthless.

Newburger, Loeb, as I say, did thrive for a time and it had some promise of being able to overcome the economic difficulties which Charlie Gross had put them in, and there were some people, Mr. Risher among them, who made a determination that he would buy the stock of Messrs. Kayne and Muh. It bore no relationship to its intrinsic worth or its market value because there was nobody other than Risher who could or would buy that stock.

Risher for a time after Kayne and Muh went back to California when Mrs. Kayne died, when Risher ran the company, but the economic undertow of the hard financial times which fell upon everybody, coupled with the endemic weaknesses of Gross' mismanagement were such that ultimately Newburger, Loeb & Company, Inc. became another wasted carcass of a failed brokerage house and Newburger, Loeb & Co. sank into insolvency.

This lawsuit was commenced in 1971. Shortly into 1972 or so, about a year or so later this brief period of hopeful performance, Newburger, Loeb began - that is, the corporation - to sink into the ooze of the inevitable failure in which it finds itself.

That is a significant fact because, as Mr. Shaw told you, Newburger, Loeb & Company, Inc. is in bankruptcy, and when the economic adversity, or the reality of the economic adversity and what that meant in terms of the financial capabilities of Newburger, Loeb & Co., Inc. became known to that villain, he added Finley, Kumble as a defendant to this case. Not an afterthought, ladies and gentlemen; simply a naked attempt, out of the same avaricious impulses, to stick his hand in any pocket that he could find for money that isn't his.

In the weeks that we will be together the proof will come in piecemeal, uncoordinated, and each piece not necessarily temporarily or logically related to that which precedes it or that which follows it. There will be a great deal of discord. There will be a great deal of disharmony in this case. But I believe in two fundamental principles. I believe devoutly that truth is affirmative and you will find the truth and that falsehood cannot mask the truth. I believe, further, that right motives gives strength to speech and freedom to action.

Finley, Kumble had right motives. Finley, Kumble does not belong in this case. Our honor, our integrity, the very heart of what we are as lawyers, is at stake in this case. I am confident, when you have heard the evidence in this case, that you will, by your verdict, vindicate us, give us back, reaffirm our right to hold our heads high as reputable, honorable members of the bar and that you will dismiss these ignoble and baseless claims against us.

Thank you.

MR. ESTERMAN: May I have one minute, your Honor?

(Pause)

MR. ESTERMAN: May it please the Court, my colleagues, members of the jury, as you heard before, my name is Lester Esterman and I am from the office of Hart & Hume, here in the city, and I represent Robert Persky.

You have heard that Robert Persky was a former tk 2 PM

last take of 6-17-75 Newburger vs.Gross Bleich

(In open court; jury present.)

MR. SHAW: Your Honor, the plaintiff calls Robert Newburger.

ROBERT L. NEWBURGER. called as a witness by the plaintiffs, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Newburger, are you familiar with the partnership Newburger, Loeb & Co.?

A I am.

Q Were you a general partner in that firm?

A I was.

Q During what period of time were you a general partner?

A From 1938 until it ceased its existence.

Q When was that, sir, approximately?

A The end of 1970.

Q Do you know Charles Gross?

A I do.

Q Is that the gentleman sitting at the back table?

A Correct.

Q Are you familiar with a firm by the name of Gross & Company?

A I was.

Q Was Gross & Company a partnership engaged in the stock brokerage business?

A That is correct.

Q Did they clear through Newburger, Loeb & Company?

A They did.

Q Now, will you describe for the jury in general terms the nature of the business of Newburger, Loeb Company prior to the time when it stopped doing business?

A You are talking specifically as of the end of 1970, sir?

Q During the entire period of time, what business were they in?

A Oh, we were in a general stock brokerage business. It involved to some degree investment banking. It involved the handling of buy and sell orders on the major Exchanges. It involved to a much lesser degree dealing in commodities upon occasion.

In other words, most all of the functions of a general investment or brokerage organization that is a member of the leading Exchanges.

Q When had the business begun?

A In 1899.

Q Who began the business?

A The business was begun by brothers Newburger that were born in Philadelphia. A couple of them stayed in Philadelphia. A couple of them came to New York and they started the business of Newburger Brothers, which shortl became Newburger Brothers & Henderson, John Henderson having been a banker with Girard Trust in Philadelphia, who helped put the organization together, and it then became Newburger, Henderson & Loeb, and it was, I believe, in 1934 after Mr. Henderson's demise that the firm became Newburger, Loeb & Company, but it has been a continuing firm since 1899.

Q Who was Morris Newburger?

A Well, there was a Morris Newburger that was the father of the original Newburger brothers. There was a subsequent Morris Newburger that was the son of Alfred Newburger, the second of the eldest of the Newburger brothers, who was a partner of mine.

I think he became a partner of Newburger, Loeb around 1932, of Newburger, Henderson & Loeb, and then Newburger, Loeb around 1932.

Q Did this gentleman pass away?

A He did in September of 1968.

Q Prior to the time when he passed away, did he have any particular position with the partnership?

A He was a general partner and as important as any other general partner.

Q Prior to his death who had been the managing partner?

A That is not an easy question to answer, sir, because we didn't use such a title at that time.

Q I see.

A He was generally recognized as being the most senior and, therefore, carried out many of the functions that a managing partner would.

Q Now, I would like to place before you this document marked Plaintiffs' Exhibit 1 and ask you if you recognize this as a copy of a letter received by the partnership on or about November 17, 1970? Do you remember that letter?

A Yes, I do.

Q Is that a letter that was received by the partnership on or about that date?

A That is correct.

Q Now at that point were you connected with the partnership?

A Yes, I was.

Q At that point was Charles Gross connected with the partnership?

A I am so bad about exact dates that far back.

Q All right.

A This says November 27, I can't say precisely.

MR. SHAW: I offer this document in evidence, your Honor.

MR. GRUTMAN: No objection.

MR. MANDEL: No objection.

THE COURT: Any objection from any other counsel?

MR.SILFEN: No objection.

THE COURT: Received in evidence.

xxx (Plaintiffs' Exhibit 1 was received in evidence.)

MR. SHAW: Your Honor, at this time I would like to read this letter to the jury.

(Mr. Shaw read from Plaintiffs' Exhibit 1 in evidence to the jury.)

Q Mr. Newburger, at this point, 1970, were any steps being taken by the partnership to collect sums of money due it from various customers including a customer by the name of Buckley? Can you recall that name?

A Yes, of course I recall the name. I recall the case.

Q All right. And had the case been entrusted to an attorney or attorneys?

A To the best of my recollection.

Q Can you remember the name of the law firm? Does the name Goldenbock & Barell help you?

A I was going to say I would like a little refreshment of memory. Yes,sir.

Q I place before you this document marked Plaintiffs' Exhibit 2 for identification and ask you if you recognize that.

A I do.

Q Do you recognize that as a copy of an agreement bearing your signature and the signature of Charles Gross?

A That is correct.

MR. SHAW: I offer this document in evidence, your Honor.

MR. GRUTMAN: No objection by Finley, Kumble.

MR. ESTERMAN: No objection, your Honor.

MR. MANDEL: I object unless a date is fixed, your Honor.

THE COURT: I didn't hear you.

MR. MANDEL: I object unless a date is fixed.

THE COURT: I am not sure I understand.

MR. SHAW: I don't understand that either.

THE COURT: Now I understand the reason for the objection.

MR. SHAW: Can I establish it?

THE COURT: Please do.

Q Can you recall approximately when this document was executed by you and Mr.Gross?

A I can't by naming a date. I can merely say that around and about the time that Gross & Company started to clear through Newburger, Loeb & Company is the time that it must have been done because the New York Stock Exchange requires such an agreement on its files when there is an arrangement clearing agreement between a clearing and a non-clearing firm.

Q Can you recall when Gross & Company began clearin through Newburger, Loeb approximately?

A No, I can't. It was many, many years ago. We have had a long association.

MR. SHAW: I offer this document in evidence, your Honor.

MR. MANDEL: May I ask a question or two on voir dire?

THE COURT: What is the subject of admissibility that your question bears on?

MR. MANDEL: It has to do with whether there was more than one occasion with intervals in between on which Gross & Company and Newburger,Loeb did business together on a clearing basis.

MR.SHAW: Your Honor, I don't think that would relate to the admissibility of this document.

THE COURT: I don't think that goes to the admissibility of the document either.

Is there any question that these signatures are authentic?

MR. MANDEL: No, your Honor.

THE COURT: All right, I will admit it in evidence.

xx (Plaintiffs' Exhibit 2 was received in evidence.)

MR. SHAW: Your Honor, at this point I would like permission to read certain paragraphs of this document to the jury.

Mr. Mandel, if you would like to look over my shoulder, you are free to do so.

(Mr.Shaw read from Plaintiffs' Exhibit 2 in evidence to the jury.)

MR. SHAW: May I just have a moment, your Honor. I am marking certain of the exhibits.

(Pause.)

Q Mr. Newburger, I am placing before you certain xerox copies of documents which I have marked and I would like to offer in a group, your Honor, again, 10, 11, 12, 13, 14, 15, 16 17, 18, 19 20 and 21.

I would like to ask you if you recognize these documents as records of Newburger, Loeb & Company pertaining to the account of David and the account of Marie Buckley.

A That is what they are.

Q These are copies of records made and kept in the regular course of business?

A That is correct.

MR. SHAW: I offer these documents in evidence, your Honor.

MR. MANDEL: Your Honor, I have no objection to these. These seem to be copies. However, I would ask that the originals be made available if we want them because there are illegibile items here.

MR. SHAW: The only thing I can say, your Honor, is that they will make an effort to provide more legible copies although we may have difficulty doing so.

MR. MANDEL: Why not bring in the originals?

I can't read some of the dates that may or may not be important. I assume Mr. Risher made these copies recently and that the originals should be available.

MR. SHAW: He didn't make the copies.

MR. MANDEL: Well, somebody did.

THE COURT: Let's see what our problems are as we go along.

These will be received.

MR. SHAW: Thank you, your Honor.

(Plaintiffs' Exhibits 9 through 21 were received in evidence.)

THE COURT: Are you going to use these now?

MR. SHAW: Just in one brief respect. May I just have a moment, your Honor?

(Pause.)

Q Mr. Newburger, I would like to ask you to examine these documents,particularly the last of these documents, the last of this batch, and ask you whether these documents show a deficit in the account of David and Marie Buckley.

A When you say "the last," do you mean Batch 21?

Q Yes.

A They appear to me to show a deficit.

Q In other words, money was owed to the firm?

A Apparently.

THE COURT: I think I will strike both of those answers out. These are appearances to you. You are not making this as a statement of fact, are you?

THE WITNESS: I am reading from the voucher or account, your Honor.

THE COURT: 21, the top sheet?

THE WITNESS: The top sheet to me shows a deficit in that amount.

THE COURT: 19 is now $661?

THE WITNESS: That is correct, sir.

Q I am sorry, would you state the amount of the deficit again, please?

A 19 is now $661.48.

MR. MANDEL: Excuse me, could we have a date for that? I may have missed it. The date of that deficit?

THE WITNESS: 3/26/70.

Q Was the account of David and Marie Buckley at Newburger, Loeb an account which was cleared through Newburger, Loeb by Gross & Company?

MR. GRUTMAN: If your Honor please, I believe having looked at those papers only briefly, some of them are for David Buckley and some are for Marie. There may be a confusion as to whether the account which was read was for both or one.

Q I am referring to both accounts. Are both of those accounts accounts which were cleared through Newburger, Loeb by Gross & Company?

A That is correct.

Q I place before you this document marked Plaintiff Exhibit 24, and ask you whether you recognize this as a document bearing your signature. I am sorry, the signatur of your brother Andrew M. Newburger in behalf of Newburger, Loeb & Company?

A That is Andrew M. Newburger's signature.

Q Did he sign that document in behalf of Newburger, Loeb & Company?

A That is correct.

Q Did you at one point sign that document as well?

A Oh, yes.

Q Do you recognize that document as bearing the signatures of various other general partners of Newburger, Loeb & Company?

A I do. As a matter of fact, I find my signature here.

Q Do you recognize that document as bearing the signature of all of the limited partners of Newburger, Loeb except maybe maybe Eldridge and Jeanne Donoghue?

A It is going to take me a minute to go through this.

MR.SHAW: I withdraw my question,your Honor. I offer this document in evidence.

THE COURT: Would you show it to Mr. Mandel.

THE WITNESS: Some pages have only one signature.

MR. MANDEL: Your Honor, I object on only one ground. This piece of paper does not represent the entire agreement with exhibits. It should come in, but it should come in complete.

I think that --

MR. SHAW: That is an inadvertence if it doesn't contain all exhibits.

MR. MANDEL: The file should be like this.

MR. SHAW: That is not the transfer agreement. You are talking about the book.

MR. GRUTMAN: He is talking about the closing binder which is a bigger document.

MR. MANDEL: Your Honor, we are not trying to keep it out. We are trying to get the whole agreement in.

MR. SHAW: If there are other portions of the agreement --

THE COURT: I will let this in. You can supplement it in any way you deem appropriate.

MR. MANDEL: May I note my objection that this is not a complete document that is being offered and the witness will so testify.

THE COURT: Mr.Grutman, I think Mr. Mandel's comment to me in the robing room was well-taken that when there is one counsel making a proffer that he and he alone should speak on behalf of that proffer.

Very good.

I will admit it in evidence.

(Plaintiffs' Exhibit 24 was received in evidence.)

MR. MANDEL: We will try to get the rest of it.

THE COURT: Would you like to recess?

MR. SHAW: Just after reading one paragraph and this finishes the chain of thought.

(Mr.Shaw read from Plaintiffs' Exhibit 24 in evidence to the jury.)

THE COURT: The date of that instrument is?

MR. SHAW: It is dated December 31, 1970, in the upper right-hand corner appear the numerals 2/5/71, and the letters F.D.

MR. MANDEL: Your Honor, I think we may avoid some confusion, I am being a little informal now, but I think there is no dispute that in fact this was signed about February 11.

MR. SHAW: I don't believe there is any dispute at all, your Honor.

MR. MANDEL: I think we should get that on the record.

THE COURT: I think it is appropriate in connection with the offer that it should be on the record. The record will show that the signatures were put on there on or about February 11, 1971.

MR. SHAW: That is my understanding, your Honor, and I so stipulate.

THE COURT: Very good.

We will stand in recess now, ladies and gentlemen, until tomorrow morning. The reason has nothing at all to do with you.

I will see you all in the jury room at that hour and we will commence at that time.

Good night.

THE COURT: Before counsel get away, with any exhibit that you can show to Mr. Mandel and get a stipulation as to admissibility, if you don't need the witness to add something to it for the record's purpose, why don't you pop it right in.

For example, these records kept in the regular course of business, rather than have Mr. Mandel spend a few minutes looking at them, if he has looked at them before and you want the witness to say they are kept in the regular course of business, that is fine, but we could save a couple of minutes and in two or three weeks we could save a couple of days.

MR. SHAW: Thank you, your Honor.

THE COURT: All right.

(Adjourned to June 18, 1975, at 10:30 A.M.)

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eob-17

Newburger, Loeb & Company, Inc.,
et al

vs. 71 Civ. 685

Charles Gross, et al

New York, New York
June 18, 1975 - 10:30 A.M.

(Trial resumed.)

(In open court; jury present.)

THE COURT: Good morning.

ROBERT L. NEWBURGER resumed.

DIRECT EXAMINATION (continued)

BY MR. SHAW:

THE CLERK: Mr. Newburger, you remain sworn.

Q Mr. Newburger, yesterday I had shown you certain records of Newburger, Loeb pertaining to the account of one David Buckley, and an account of Gross & Company which was cleared through Newburger, Loeb, and I asked you a question with respect to a deficit in an account, and I believe that you gave a figure of approximately $180,000.

Can you recall giving that testimony?

A Yes, I can from Exhibit 21, I believe.

Q Right. This is Exhibit 21, is it not?

A That is correct.

Q As of what date was there a deficit in the account reflected in Exhibit 21?

A On 3/26/70 there was a deficit of $182,661.48.

Q Was this the account of David W. Buckley?

A That is the way it is titled, yes, sir.

Q As of the date 3/26/70, was there also an account at Newburger, Loeb under the name of Mrs. Marie S. Buckley, 82 West River Road, Rumsen, New Jersey?

A That is correct.

Q As of that date, March 26, 1970, was there anothe an additional deficit in the account of Marie S. Buckley?

A That is correct, there was.

Q What was the amount of that deficit?

A It appears to be $189,862.38.

Q So as of this date, March 26, 1970, the amount of the deficit in the two accounts was a little bit less than $400,000, would that be substantially correct?

A That is correct.

MR. SHAW: Thank you.

Q Now, I believe that I asked you a question yesterday with respect to Morris Newburger, who I believe you indicated at one time was the managing partner of Newburger, Loeb & Company.

A I don't believe I said that, sir.

Q Was he the partner who made more of the decisions than the other partners during a certain period of time?

A I can't answer that with a yes or a no. That is much too difficult.

Q A time came, however, when Charles Gross became the managing partner?

A That is correct.

Q When was that, sir, approximately?

A I'd have to, to the best of my recollection say it was some time in early to mid-July of 1969. That is not accurate. That is approximate.

Q Prior to the time that Mr. Gross became the managing partner who, if anyone, had been the managing partner of Newburger, Loeb & Company?

A We didn't really have a managing partner.

Q During what period of time was Mr. Gross the managing partner of Newburger, Loeb & Company?

A From the approximate time that I just gave you to the best of my recollection, to -- I am so bad trying to get within a month or two -- but I would think it was around a year later.

Q Would you say some time during the summer of

1970, sir?

A Yes, definitely, I would say some time during the summer.

Q After the summer of 1970 who was the managing partner of Newburger, Loeb & Company, if anyone?

A Mr. Gross was succeeded by Mr. Kayne as managing partner.

Q For how long a period of time was Mr. Kayne the managing partner?

A Mr. Shaw, so much of this telescopes in my mind, it is really very difficult for me to try to be accurate. All I can say is that he was managing partner for a certain period of time after he took over, until he resigned, and to the best of my recollection that had to be Septemberish, some time around in there.

Q After Mr. Kayne resigned, who, if anyone, was the managing partner of Newburger, Loeb & Company?

A We didn't have anyone that used that title,at the behest of the New York Stock Exchange, or in agreement with them, because of our problems, and they were monitoring our every major move. Mr. Risher and Mr. Muh were in sort of an arrangement that I had never heard of before, but in the eyes of the Stock Exchange they accepted them as being management, although they were employees at the time, to the best of my recollection.

Q Now, did there come a time when you met an attorney by the name of Robert S. Persky?

A Yes.

Q Did there come a time when Newburger, Loeb & Company was represented by Finley, Kumble, Underberg, Persky, a firm by that name?

A That is correct.

Q Can you recall who the managing partner of Newburger, Loeb & Company was when Mr. Persky and Finley, Kumble came to represent Newburger, Loeb?

A I wish I could tell you exactly. I do believe it was Mr. Kayne who brought them to us, but whether he had already become managing partner or not, I don't really recall.

Q Can you recall if the Buckley claim or the matter of the deficit in the David and Marie Buckley account was referred to the Finley, Kumble firm?

A I do believe it was.

Q Do you know the name or names of the attorneys at theFinley, Kumble firm to whom this matter was referred?

A I do not.

Q Mr. Newburger, will you describe the nature of your activities as a partner of Newburger, Loeb & Company?

What was the prime area of your day-to-day function?

A At what point in time?

Q During the period 1969 through 1970, towards the end of the business?

A Towards the end of the business, it was much different than it had been before because I had represented the firm on the floor of the Stock Exchange for many years until, I guess it was, late in '68 or early in '69 we sold one of our two seats because we wanted to increase our capital. We sold it for $450,000, approximately. We sold the seat that I utilized on the floor for the firm and I came upstairs and I had the title of chairman of the executive committee. I picked it up a little bit later, I guess.

Q Now, during the period when you were the partner of Newburger, Loeb, who worked on the floor of the New York Stock Exchange, was Gross & Company a broker whose customers were clearing through Newburger, Loeb?

A That is correct.

MR. MANDEL: I object to the form of that question because there is an ambiguity in the time. As I understand it, Mr. Newburger did not say when he began to be a floor trader. He just said he was on the floor of the Exchange at the end.

MR. SHAW: The question, your Honor, is only during that period was Gross & Company a clearing firm. Not during the entire period. I don't think there is any question as to what the period was, but if you would like me to clarify the question, I will be more than glad to do that.

THE COURT: Why don't you.

Q Mr. Newburger, how long were you the member of Newburger, Loeb who functioned on the floor of the New York Stock Exchange?

A From 1960. from May of 1960 to either the end of 1968 or the beginning of 1968.

Q Do you recall approximately during what period Gross & Company cleared through Newburger, Loeb?

A No, I don't. It was a great number of years.

Q Are you familiar with the relationship between a clearing firm and a firm such as Gross & Company in relation to the sales of stock on the floor of the Exchange?

A If I understand your question properly, yes, I am familiar with most aspects of clearing arrangements.

Q Does the clearing house handle the actual physical purchase and sale of stocks?

A Correct, they do.

Q Does the clearing house handle the recordkeeping -

THE COURT: Mr. Shaw, this is leading. Why don't we have the witness describe what is involved.

MR. SHAW: I was merely trying to save time, but all right.

Q Will you describe the relationship between a clearing house and a house such as Gross & Company whose transactions are cleared by a clearing house?

A All right. Briefly, I may leave out some small details, but, briefly, the non-clearing firm makes their home or is provided with a home by the clearing firm. They are provided with a home, clerical services and whatever is required physically really in the conduct of their business.

Their margin accounts are provided with the proper capital to satisfy the rules and regulations of the New York Stock Exchange and the Securities Exchange Commission.

Briefly, it is a home for the non-clearing firm and takes the housekeeping duties away from the firm that clears through it in return for a certain stated percentage of the commissions that are generated by the firm that introduces the business.

If there is anything more specific, I will be happy to respond.

Q Does the clearing house have direct contact with the customer?

A Only under the rarest sort of circumstances, but as a general rule, no.

Q Is the clearing house in day-to-day telephonic communications with the customer?

A No, sir.

Q Who is in such contact, if there is such contact?

A Whatever partner or registered representative of the firm that has that customer, that has introduced that customer.

Q When an account is opened up with a brokerage firm, is it the ordinary and customary and invariable procedure for there to be a preliminary interview with the customer?

A Interview by whom, sir?

Q That is my next question. Is there always an interview?

A Well, my problem is I don't know whether you are talking about the firm that clears through the other firm or the firm that does the clearing.

Q Will you answer it with respect to the firm that is clearing through the other firm?

A All right. Obviously there has to be an interview of some nature because how did the client get to the broker to do business without an interview?

Q Who conducts that interview?

A A representative of that non-clearing firm.

Q Now, the clearing agreement refers to, in paragraph 10, which was read to the jury --

MR. MANDEL: Your Honor, may we have that identified by number for the record, so it is intelligible later.

MR. SHAW: Exhibit 2.

Q Refers to the fact that Gross & Company will learn the essential facts with respect to each of its customers and will give an approval for the opening of each account. At what point is the broker required to learn for the first time the essential facts with respect to each of its customers?

MR. MANDEL: I object to the form of that question, your Honor.

THE COURT: Yes, sustained.

Q Can you tell the Court and the jury the purpose of the initial interview which you talked about before?

A First of all, may I instead of using the word "interview" perhaps call it "consultation" or "meeting" or whatever, because interview sounds so formal and it isn't -- I don't believe any two people do it exactly the same way, but when the representative of the brokerage firm sits down with the potential client, he has an obligation to either have already known the potential client and known a great deal about him or at that consultation or interview or whatever you wish to call it, he has to learn sufficient facts to feel that he "knows his customer" enough so that he can act as his broker and satisfy ceryain rules and regulations of the Stock Exchange and the Securities and Exchange Commission.

MR. MANDEL: Excuse me one moment, your Honor. I am going to object and move to strike unless this is -- as I understand this testimony, the witness is talking about obligations and customs of the New York Stock Exchange. He is testifying in the present. He is talking about the rules of the Exchange and he is also testifying in the present.

MR. SHAW: I object. This is not a valid evidentiary objection. This is some sort of a summation before the jury, which is improper. If it is going to be lengthy, it should be at the bench.

MR. MANDEL: Your Honor, my point is it is irrelevant and prejudicial unless it is related to the time in question.

MR. SHAW: I will be more than glad to establish the period.

THE COURT: I assumed it was.

MR. SHAW: Thank you, Mr. Mandel.

Q During what period of time --

THE COURT: Mr. Mandel, if you have an objection like that, that must be asserted before the answer. You can't hear the question and then let the witness give us the whole answer and then move to strike.

MR. MANDEL: I don't think that the time element was apparent from the question. I may be wrong.

THE COURT: Very good.

Q Mr. Newburger, during what period of time was there this procedure with respect to the customer?

A For years.

Q How many years approximately? Was it in effect during 1960, for example, and before that?

A Oh, sure.

Q I would like to get back, if I may, to the debit balance that you spoke about originally this morning and you talked about yesterday. Did the various partners, and I am referring to general partners of Newburger, Loeb, have a capital account?

A You mean the general partners as a group or individually?

Q As a group.

A No, sir.

Q Did each individual have a capital account?

A At least one; sometimes more than one.

Q Did the aggregate of the capital accounts of the general partners constitute a portion of the capital of the partnership?

A Correct.

Q In addition to there being general partners, were there limited partners?

A Correct.

Q Did each limited partner have a capital account?

A Correct.

Q Did the aggregate of the capital account of the various limited partners constitute a portion of the capital of the partnership?

A Correct.

Q Now, in addition to there being general partners and limited partners, were there subordinate lenders?

A There were.

Q Who were the subordinate lenders?

A You wish me to name them?

Q Generally. Withdrawn.

Let me withdraw the question.

Had the subordinate lenders loaned various sums of money to the partnership?

A Various sums of money or things transferrable.

Q Securities?

A Securities.

Q Did the capital of Newburger, Loeb consist of moneys and securities in the various capital accounts and loaned by subordinated lenders?

A Correct.

Q What was the effect, if any, by virtue of a deficit in the sum of $400,000 in the Buckley account or accounts upon the capital of Newburger, Loeb?

A The accounting end of the business was an area that was foreign to me. Obviously --

THE COURT: Wait. Mr. Newburger, do you know the answer to this question or are we going to have a surmise?

THE WITNESS: I have to give a generalization. I do know it was a drain, but to what degree I do not know.

Q YOu do know it was a drain?

A Yes, but I can't specify.

Q By that do you mean there was a diminution of the capital account to the extent of the deficit, a lessening?

THE COURT: Mr. Shaw, your question is leading.

MR. SHAW: Your Honor, I withdraw the question.

THE COURT: All right. He said it was a drain and he doesn't know to what extent.

Q Now, the total amount of the Buckley deficit -- withdrawn.

In the operation of a clearing account can you describe how the clering broker functions with respect to a margin account? Do you understand my question?

A I believe I do.

MR. MANDEL: I am going to object, your Honor, unless it is clarified to apply to this case or to be some kind of a generalization.

THE COURT: I assume that is the practice with regard to a margin account in the period 1962 to 1966.

MR. SHAW: That is right, your Honor, during this period of time.

MR. MANDEL: Between Gross & Company?

THE COURT: No, this is the practice. We are assuming it is limited to that period.

MR. MANDEL: The general practice.

THE COURT: Go ahead.

A The initial margin required on a transaction is the responsibility --

THE COURT: Can I stop you. This jury -- some members may or may not know what margin is. There is no foundation for what a margin account is, so let's get a little of that.

MR. SHAW: Let me withdraw the question, your Honor, if I may and phrase it another way.

Q Would you tell the members of the jury what a margin account is?

A A margin account is where a client wishes to buy securities and does not wish to pay for them fully, but wishes to borrow certain allowable amouns of the sum required to buy the security from the broker, and that amount that they would borrow from the broker or that the broker would set aside to take care of their purchase is called "margin."

That is a margin account as opposed to a cash account that is paid for in full by the client.

Q Where an account is cleared, who does the customer borrow the money from in a margin account?

A I am trying to frame my answer so that I can be quite specific, basically from the firm that clears for the other firm. The capital of that firm is used to finance the margin portion of the client's purchase or sale of securities.

Q So that if there is a deficit in a margin account, that represents money due to the clearing broker, such as Newburger, Loeb?

A That is correct.

Q If that deficit is not paid, that represents a loss to the clearing broker?

A That can't be answered just like that, sir, becau the securities may have gone up in price and they may be sold at a profit. I don't want to --

Q I understand. Let me clarify it this way: in a margin account who actually pays for the stock purchased?

A The client and the firm that clears for the other firm.

Q If the client doesn't pay, who pays for the stock purchased?

A The clearing firm.

Q In such case Newburger, Loeb, correct?

A Correct, yes, sir.

Q Now, in this case are you familiar generally with the stocks that were in the account, as well as the debit balance in this account, the Buckley account?

A Only with one stock, sir.

Q Are you referring to Westec?

A Yes, sir.

Q What does the expression "long" mean?

A To own, to possess, to be long of something is to own something or to possess it.

Q At the end of the activity in this account, was it long a certain number or quantity of shares of stock?

A I wouldn't want to say unless I looked at a piece of paper that would so designate.

Q I suggest you look at 21.

A Yes, sir.

Q How many shares of stock was it long?

A On 3/26/70 the account of Mr. David Buckley was long 6200 shares.

Q What about the account of Marie Buckley, that is at the end of 21. I will get it for you.

A The account of Marie Buckley was long 7600 shares.

Q Was that in both instances shares of Westec stock?

A Correct, shares of Westec.

Q Did those shares of Westec stock, to your knowledge, ever go up in value?

A At what point in time, sir?

Q After 1970.

A No,sir.

MR. MANDEL: Your Honor, we may be able to save an awful lot of time. We are willing to stipulate what Newburger, Loeb lost as a result of the collapse of the Buckley account. I don't think there is an issue about that in this case. I don't think we should waste time with it.

I think we can agree that the Buckley accounts collapsed in '66 and that at the end there was some kind of settlement made and Newburger, Loeb was out-of-pocket money, whose ever fault and responsibility it was.

The question is not were they out. The question is responsibility.

MR. SHAW: I am appreciative of that offer from Mr. Mandel, your Honor. As I understand it, there is no issue in this case that there was an actual loss by Newburger, Loeb & Company of the sum of approximately $400,000 by virtue of the David and Marie Buckley account being in deficit as indicated in Exhibit 21.

MR. MANDEL: I don't think that is the full amount after the credits for selling stock and so forth.

MR. SHAW: Perhaps what Mr. Mandel and I can do, your Honor, is adjust those subsequent credits. Right now it is approximately $400,000.

THE COURT: These are frankly a matter of record, in any event, as to which this witness really knows nothing except what he reads from a piece of paper.

MR. MANDEL: That is correct.

THE COURT: Are you correct?

THE WITNESS: That is correct.

THE COURT: You don't carry this in your head?

THE WITNESS: No.

THE COURT: You and Mr. Mandel will work out the figure and will announce it when you arrive at agreement based upon the records.

MR. MANDEL: Right. We can talk about the loss.

MR. SHAW: Thank you, your Honor.

I have no further questions at this time of Mr. Robert Newburger. However, your Honor, subject to my right to recall Mr. Newburger with respect to other aspects of the case unrelated to the churning claim which your Honor has indicated I should begin with first.

THE COURT: I understand.

Very well. Mr. Mandel, do you have any cross-examination?

MR. MANDEL: Oh, yes, sir.

THE COURT: On this subject?

MR. MANDEL: On his testimony today.

THE COURT: On the subject of the direct examination?

MR. MANDEL: That is correct.

THE COURT: Very good.

MR. MANDEL: I will come back to that. We will search amongst our files.

Q I would like to start now with some examination of the meaning of the clearing arrangement.

A Of the clearing what?

Q Clearing arrangements. You testified that Newburger, Loeb was the clearing house for Gross & Company during a long period of time and I take it that includes a period beginning until 1960 and goes to the end of 1968 when Mr.Gross joined Newburger, Loeb as a partner, is that right?

MR. SHAW: Objection, your Honor, to the use of the words "until 1960." It was after 1960. In other respects the question is correct. He uses the word "until."

I think he means "from."

THE COURT: I think the question is understandable.

Go ahead and answer.

A I don't know exactly. It was for a long period of time and I am sure included that period.

Q The relationship continued until Mr. Gross joined Newburger, Loeb as a partner at the beginning of 1969?

A That is correct.

Q The office of Gross & Company was inside the offices of Newburger, Loeb, is that correct?

A That is correct.

Q And was Newburger, Loeb paying the rent?

A That is correct.

Q Were there other originating houses in the same premises --

THE COURT: You are talking about this entire period?

MR. MANDEL: Yes.

THE COURT: 1960 to '68?

MR. MANDEL: Yes.

THE COURT: All right.

Q Were there other originating houses clearing through Newburger, Loeb at the same time?

A Correct.

Q How many?

A On the premises?

Q Yes.

A Because some were off the premises.

Q How many on the premises?

A I would have to give you an approximation because that period of time the number varied.

Q Name the houses.

MR. SHAW: Objection, your Honor. This is irrelevant.

A I will certainly say five.

THE COURT: Yes, sustained.

MR. SHAW: Please, there is an objection.

THE COURT: You had a question about to which he was giving you an answer. Let's get that answer.

A Approximately five, at any rate.

Q The statements that went out to the customers were statements prepared by Newburger, Loeb, is that correct?

A That is correct.

Q On Newburger, Loeb letterheads, is that correct? I mean on Newburger, Loeb printed forms, is that correct?

A Yes, that is correct.

Q And the confirmations that went to the customers went out on Newburger, Loeb confirmation forms, is that correct?

A That is correct. May I add to that?

Q Wait for my next question.

MR. GRUTMAN: Please, your Honor --

THE COURT: No. He has an answer to his question and Mr. Mandel is examining. Let him conduct his examination his way, please.

Q Those confirmations and statements also bore a stamp at least at times saying "by courtesy of Gross &

Company"or"by courtesy of Graftine & Company"?

MR. SHAW: Objection, your Honor. Graftine & Company has nothing to do with this litigation.

THE COURT: Overruled.

Q Is that correct?

A Yes and no. In some cases I do believe -- I am not sure because we had different arrangements with different firms. Sometimes it was a stamp. Sometimes their name was actually imprinted not as a rubber stamp, but gave the appearance of being as much a part of the letterhead as was the name Newburger, Loeb. I don't recall at the time whether Gross & Company, it was a stamp or whether it was an imprint.

Q We will put them in evidence.

A Or whether it bore both names.

Q When the customer paid for securities, he wrote a check to Newburger, Loeb, is that correct?

A To the best of my knowledge. I was not involved in that part of the business of receiving checks and there may have been other ways that it was handled, but Newburger, Loeb certainly received the moneys.

Q And the money went into the Newburger, Loeb account, is that correct? The customers --

A They paid Newburger, Loeb and Newburger, Loeb received the money and took it in.

Q After Newburger, Loeb took the money in, Newburger Loeb paid the seller of the security or the broker of the seller of the security, is that correct? My question is not clear to you? I will start again.

I am tracing a buy transaction. The originating house places an order, the customer wants to buy 100 shares we will say of Westec. Newburger, Loeb buys it on the floor for him, right? Yes?

A Yes, I am sorry.

Q Newburger, Loeb sends the customer the confirmation?

A That is correct.

Q The customer sends his check in payment for Newburger, Loeb?

A That is correct.

Q Newburger, Loeb then pays the seller?

A Yes.

Q Newburger, Loeb then pays the seller of the security or the broker of the seller of the secuirty, is that correct?

A Correct.

Q Newburger, Loeb then enters these transactions on a Newburger, Loeb bookkeeping account or computer account, is that correct?

A The proper entries are made to designate the actions that you have just described.

Q On the StockExchange records, all of these are carried as transactions of Newburger, Loeb & Company, the Stock Exchange records do not reflect the originating house, is that correct?

A Not to my knowledge.

Q Now, let's trace a sale of a security by such a customer. The customer says, "I would like to sell 100 shares of AT&T."

That goes to the Newburger, Loeb order clerk, does it not?

A The Newburger, Loeb order clerk receives it in the proper point in the chain that the transaction brings forth.

Q And the Newburger, Loeb order clerk transmits that to the Newburger, Loeb broker on the floor somehow, is th correct?

A Correct.

Q And the Newburger, Loeb broker buys it through -- yes?

A Didn't you say sale of security?

Q Yes, excuse me. The Newburger,Loeb floor broker handles it on the floor, is that correct?

A That is correct.

Q And then Newburger, Loeb actually receives the money for that sale, is that correct?

A That is correct.

Q From the buyer. And Newburger, Loeb puts that money in the Newburger, Loeb account, that is its cash account or its check account or some kind of an account, and then gives the customer an advice of credit, is that correct?

A I won't bandy words. Yes, that is essentially correct.

Q If a customer wants to be paid, Newburger, Loeb sends him a Newburger, Loeb check, is that correct?

A If the customer is entitled to be paid and asks for the money or arrangements have been made prior to that that he will receive proceeds, then the check is sent.

Q I think you said you understand the customs and rules of the Stock Exchange with regard to these matters, did you not, on direct?

A Did I?

MR. SHAW: Objection, your Honor. That is not my recollection of this witness' testimony. I think it is an improper paraphrase. I don't recall it either.

THE COURT: Mr. Mandel, lay a foundation for your line of questions.

MR. MANDEL: All right.

Q You recall you were talking about the "know your customer" rule before, and in connection with that you said you were familiar with the rules and the customs of the Exchange and the brokerage community, did you not?

A If you say I said so in my testimony, I don't recall having said just that. If you want to ask me now --

Q Let me ask you now. Are you familiar with the rules and the customs of the brokerage community concerning the "know your customer" rule?

A I don't claim to be an expert, but I am familiar with them.

Q Are you familiar with the rules and customs of the Stock Exchange and the brokerage community regarding clearing houses and originating houses and their customers?

A My answer is the same as the answer to the prior question.

Q All right, the fact of the matter is, is it not, that under the rules of the Exchange the customer is the customer of the clearing house, in this case Newburger, Loeb & Company?

MR. SHAW: Objection, your Honor, unless there is a reference to a rule of the Exchange. This is all matte that is in writing. It is contained in a book. I don't think this is the way of bringing it out.

THE COURT: Overruled. You may answer.

REad the question back.

(Question read.)

A I believe that technically that is correct.

Q Now, are you familiar with the term "compliance"?

A I am.

Q What does that mean?

A I assume you mean in relationship to the brokerage business and the handling of accounts and it is frequently used alongside with the word "surveillance."

Q Yes.

A In a firm of my size it has at least one person whose function it is to oversee the proper compliance and surveillance of the activities of that firm in connection with rules that must be observed and complied with.

Q Would you agree with me, and I am just trying to make this clear to the jury, that compliance and surveillance means the activities of the brokerage house to make sure that the customers and their accounts are being treated --

MR. MANDEL: Will you please let me finish the question?

MR. SHAW: I am just standing up because I intend to object to your question.

MR. MANDEL: I will have to start it again.

THE COURT: Yes, start it again.

Q Will you agree with me that the words "compliance" and "surveillance" are words of art in the brokerage business-

A Words of what?

Q Words of art, technical words of that business and what they mean are the activities of the broker to make sure that the customers' rights are being -- and customers' accounts are being handled properly in accordance with the rules of the Stock Exchanges and the Securities and Exchange Commission?

A That is not my understanding.

MR. SHAW: Objection, your Honor.

THE COURT: What is the basis for the objection?

MR. SHAW: The objection is that there are five questions in one. It is the fundamental issue in this case. It is an attempt to put on Newburger, Loeb the entire job of compliance and surveillance and to completely exonerate Gross & Company from any of those duties.

THE COURT: Mr. Mandel, as I gather it, is examining into where the community understands certain responsibilities to exist. That is all he is examining on.

He either knows that or he doesn't know.

MR. SHAW: My further objection to the question, your Honor, is that it has at least four or five parts to it and it is unduly complicated and it should be broken up.

THE COURT: I will sustain the objection on the grounds of form, but the substance may be inquired of.

The objection is sustained on the grounds of the form of the question.

MR. MANDEL: All right.

Q Let's approach it another way. During 1962 to 1968, did Newburger, Loeb perform any compliance and surveillance activities?

A Indeed.

Q What were those activities?

A It is a very long answer. If I go into all the details. If I can generalize, I can perhaps answer it better.

THE COURT: Answer it.

Q I would like you to answer it.

A Those activities consisted of a surveillance of the daily sheets of transactions, of all transactions that wen through Newburger, Loeb by designated partners, with an eye to detect anything that might possibly not be in compliance with the proper rules and regulations under which we live, the rules and regulations laid down by the New York Stock Exchange and by the Securities and Exchange Commission and the NASD, and any other bodies that have any authority over investment firms or member firms, and to investigate thoroughly and run down to earth any items that might be the slightest bit suspicious and thus satisfy themselves that either there was no wrongdoing or if there was, to correct it, and in that effect oversee the compliance, or through surveillance to make sure that there was compliance with the proper rules and regulations.

That was one aspect of it, but that was a daily in-house situation and in time as transactions became more and more, and as our volume got bigger and bigger, we set up a special department or people to do that for us, who had a legal background,and that is, in general, the way we basically handled it.

Now, if certain situations arose that were of an individual nature that required the attention of more than one or two or three of us, then we would do whatever was required?

Q During the period 1962 to 1966, while the Buckley account was being carried by Newburger, Loeb & Company, who was responsible for compliance in Newburger, Loeb?

A Basically Morris Newburger.

Q Did he get daily records of all of the transactions done by the firm every day?

A He did.

Q And that included the transactions done -- originated by the originating houses?

A He did.

Q Did he examine the originating house transactions?

MR. SHAW: Objection, your Honor.

THE COURT: Unless you can show, Mr. Mandel, that there is some awareness on the part of this witness that he, in fact, did it. There is no foundation for the question.

Q We will talke about was it his job at that time, his duty at that time to examine those daily transactions in accordance with your prior answer to make sure that everything was done correctly?

A All transactions that flowed through Newburger, Loeb.

Q Including the Buckley transactions, is that right?

A Including any transactions that took place through Newburger, Loeb.

Q So when you say specifically including all the Buckley transactions --

A Whenever there was a Buckley transaction, it appeared on our daily sheets and it was viewed by whichever partner at that time or whichever compliance officer subsequently was handling that particular responsibility.

Q Was one of the things they were supposed to be looking for churning?

A Yes.

Q Yes. Well, let's leave the Buckley account for the moment and we will talk about custom. If Morris Newburger saw something questionable when he examined the daily sheet, what was he supposed to do?

A You say was he supposed to do or what did he do?

THE COURT: What was he supposed to do?

THE WITNESS: Well, your Honor --

THE COURT: What was the practice of the compliance partner under such a circumstance?

THE WITNESS: To investigate.

Q And find out?

A To investigate until he was satisfied as to what the situation was.

THE COURT: Mr. Mandel, is this a good time to recess or you tell me.

MR. MANDEL: Not this second, your Honor. The next few minutes are critical.

THE COURT: Go ahead.

Q Now, in making that investigation could he go to the customer's man in the Newburger, Loeb premises to ask him about it?

A You say could he?

Q Yes.

A Or did he?

THE COURT: Could he?

THE WITNESS: He could.

Q Did he?

MR. SHAW: Objection, your Honor. Did he waht, in this case or in every case. The question is bad with respect to form.

THE COURT: Practice.

Q I am talking about practice.

A Practice, unless he had established a particular and close relationship with that customer's man of an introducing firm, he would not. He would go to the partner of the introducing firm and point out to him what he felt had taken place through one of that particular partner's employees.

Q So you have got a situation, let's get to the

Buckley case, where Gross & Company were physically located right in Newburger, Loeb & Company's offices, that is right, isn't it?

A That is correct.

Q Morris Newburger was located right in that same office, is that correct?

A That is correct.

Q And Charles Jordon, you remember him?

A Yes, I do.

Q Was physically lcoated right there, wasn't he?

A That is correct.

Q And he was a partner of Gross & Company, wasn't he, if you know?

A I believe so.

Q And Charles Gross was physically located right there, is that correct?

A That is correct.

Q So that if Morris Newburger wanted to talk to Mr.Gross or Mr. Jordon about a transaction in the Buckley account at the end of some day when he looked at the sheets, how many steps would he have to take, 100, 200?

A I think less than 200 and maybe around 100. I don't know just -- he had a long step. He was a tall man.

Q The fact of the matter is, is it not, that Morris

Newburger was very diligent about these matters, wasn't he?

A Morris Newburger was a very capable and diligent man.

Q Wouldn't you also say that he was a very honest man?

A I certainly would.

Q And wouldn't you also say that he was almost fanatically careful to protect Newburger, Loeb from violating customers' rights and getting a bad name?

A I wouldn't describe it that way.

Q How would you describe it?

A Diligent.

Q I think you said yesterday that Morris Newburger, though he didn't have the title, was amongst the most senior partners?

A And then I went on to say that I believe he was the"seniorist", which I don't believe is a real word.

Q Was the most senior?

A Most senior.

Q Was he doing this compliance job continuously between 1962 and 1966 himself?

A Yes, but I believe in the later stages he got some help. Now I don't know just when.

Q Who helped him?

A I don't know. We had a number of different -- first of all, one of our partners, Leo Stern, he was not the only one, Leo Stern, that would help him from time to time, he was a senior partner and others filled in when there were violations, but it was basically Morris Newburger with Leo Stern backing him up in doing this work.

May I add that this was basically a function of Morris Newburger because he had charge of the margin department and the two things went together very well.

THE COURT: Mr. Mandel, we will take our recess at this point.

MR. GRUTMAN: Your Honor, may we see you in chambers for a moment.

THE COURT: As soon as the jury leaves I will hear you.

(Jury leaves the courtroom.)

MR. MANDEL: Your Honor, I am concerned about two things. One thing is that I am afraid that as a result of a ruling you made in chambers yesterday, there is a new cause of action floating around here and I don't know what it is.

You recall that there was some talk about amending -- I haven't seen the physical amendment.

THE COURT: The answer is I am going to sustain an objection to your question. What you are really doing is fishing in this area without any anticipation of what you are going to get and that has nothing to do with my initial concern.

I will sustain the objection.

MR. SHAW: Thank you.

MR. GRUTMAN: Fine.

THE COURT: This is collateral, Mr. Mandel.

(In open court.)

BY MR. MANDEL:

Q I think you said that certain people in Newburger, Loeb got daily records of all transactions of every account, is that correct?

A Correct.

Q And they got those at the end of the day?

A Correct.

Q And they reviewed them at the end of the day?

A Correct.

Q Who, to the best of your knowledge, what persons in Newburger, Loeb got those daily --

MR. SHAW: Objection, we have been into this already. I believe the testimony was that it was Morris Newburger, and it is repetitious.

THE COURT: I thought so.

MR. MANDEL: I am trying to find out if there was more than Morris.

Leo Stern. I am trying to find out how many others, your Honor.

THE COURT: Just ask him, please.

Q How many others and who were they?

A I have explained Morris Newburger's role. I have explained Leo STern's role as backup. At times of vacation, Andrew Robert Newburger, Andrew Stern and myself would fill in if necessary.

We like to have one person with the prime authority and another person with backup with whom Morris -- let's say if Morris found something that he felt bore a closer scrutiny and was what he felt of major concern, he would call Leo, perhaps, and discuss it with him. Those of minor concern he would follow up himself.

If either of them weren't around, then it would fall upon the rest of us, but I dare say Morris was involved 90 per cent of the time.

Q Among other things was it Mr. Morris Newburger's duty to scrutnize the volume of transactions in any account on any one day?

A His duty?

Q Was it part of his job in doing this compliance?

A In reading the sheets?

Q Yes.

A Which gave the number of shares traded, bought or sold, which gave the name of the account, whether the account had been introduced to us by a member firm or whether it was one of our own accounts, because we had perhaps 100 registered representatives of our own that figured in the daily sheets.

He would review the thing in toto.

Now, no two people look at a picture entirely. Perhaps he had a different method of looking at it than perhaps Leo Stern did. Certain things could pop up out of the paper, if you look at it long enough and a pattern develops, they do to me if I were to review it. How Morris reviewed it and how he came to a conclusion as to what needed scrutiny or not is his own recipe. I can't say what it is.

However, we all felt it extremely effective however he did it.

Q Was it also his duty to examine the kind of securities that were being bought in the various accounts?

A I said, Mr. Mandel, everything about all transactions were there on paper and so he would be aware of what securities were bought or sold.

Q Was he also supposed to know and take into consideration the kind of account in quetion, that is, whether it was an investment account or a trading account or a speculation account?

MR. SHAW: Objection,your Honor. I think that should be broken down because the kind of account might involve an issue with respect to who David Buckley was.

The other question is whether it was margin, discretionary or special is a totally different issue.

THE COURT: Sustained as to form.

Q Was Mr. Newburger also supposed to review the transactions in connection with the nature of the specific account?

A To answer that as best I can, sir, I am going to have to be a little bit indirect. Only if he saw something that he felt might be improper would he then discover the nature of the account, because he would then inquire into who it was and he would then know more about the nature of the account.

The nature of the account was not in writing on the daily sheets.

Q Is my understanding correct that between 1962, when the Buckley accounts first came to Newburger, Loeb & Company, until the last time anything was done in connection with any of the Buckley accounts, every transaction in the Buckley account, in any Buckley account, showed on that day's daily transaction sheet?

A That is correct.

Q Now, I would like to talk to you -- change the substance a little bit -- about margin. Margin really means a situation in which the customer owes the firm the money and the firm holds securities as pledged, is that correct?

A I think that is a reasonable generalization. I am not expert on margin accounts. I had nothing to do with the margin department, but as a generality I would say that is sufficient.

Q But basically the difference between a margin account and a cash account is that in a margin account the customer does not pay in full for the stocks, he only pays part of the price?

A I don't believe that is necessarily so, and I don't want to confuse the issue or confuse the jury, because you can have a margin account and still deal for cash. You do not have to, and it can be of varied types.

We can get very complex here in an area where I am not an expert, but there are all sorts of accounts within the title "margin account." I tried to explain to the jury earlier that basically a margin account was where the

the agreement. My understanding here, your Honor, is that somehow Mr. Shaw has been trying to establish on direct--

THE COURT: I don't want to get into that kind of an argument here. I will sustain the objection at this time and I will hear you at the recess.

All right.

Q Now, do you know whether Newburger, Loeb ever brought action against anybody because of the loss in the Buckley account?

MR. SHAW: Objection. Because of the loss in the Buckley account?

MR. MANDEL: Yes.

MR. SHAW: I withdraw my objection, your Honor.

A I do not.

Q Don't you know that Newburger, Loeb started an arbitration against Buckley? Don't you know that?

A I am trying to recollect. I don't know it. I heard various things about the Buckley account, but whether there was an arbitration or not, I don't know.

I know there were communications and efforts to try to get money. I know that or I believe that I heard from Mr. Stern that he had approached either Mr. Buckley or Mr. Buckley's father. I do not have any personal knowledge of an arbitration.

Q Do you know that an arbitration against David and Marie Buckley brought by Newburger, Loeb & Company was settled by Newburger, Loeb & Company in December of 1970?

A I can only answer that indirectly by telling you that I understand that a settlement was made between the parties, but I was not aware of the fact that an arbitration had been involved.

Q Did you authorize the settlement to be made?

A Did I personally authorize the settlement to be made?

Q Yes.

A As a partner, maybe I did indirectly. I was not involved.

Q Nobody asked you one way or the other?

A Not to my recollection.

Q Do you know, in December of 1970, were you chairman of the board?

A You mean chairman of the executive committee. It was just titular when I was.

Q All right, you were chairman of the executive committee --

A At what point are you asking?

Q December of 1970.

A December of 1970, I don't remember whether I was or I wasn't. The partnership is so radically changed and moved around and was at that time, I believe, under the management of Mr. Risher and Mr. Muh, so I can't state exactly what my official title, if any, was.

Q Mr. Risher and Mr. Muh were not partners of Newburger, Loeb in 1970, is that correct?

A That is correct.

Q They were never partners of Newburger, Loeb?

A That is correct.

Q But you say they were running the Newburger, Loeb business in December of 1970?

A I think I said they were management and I think in my testimony yesterday I stated that that was at the behest of the New York Stock Exchange.

Q You mean at the request of the New York Stock Exchange, is that what you mean?

A Well, I thought that "behest," because -- all right I will use the word -- not request so much as command, if we were to continue business, we would have to have management that would satisfy them and the only answer that we could come up with that would satisfy them was Mr. Risher and Mr. Muh, so that is why I said at the behest. If I am not using the word correctly, I am sorry.

Q Is it your testimony that Mr. Risher and Mr. Muh in December of 1970 had the authority of the partnership to settle theBuckley claim?

A I didn't say that. I said they were management.

Q Who had the authority to settle the Buckley claim?

A I would have to believe the partnership. The partners, the general partners of the partnership.

Q Do you know whether any partner authorized the settlement that was made of the Buckley claim?

A I would have to assume someone did.

MR. MANDEL: I move to strike.

THE COURT: Strike it out.

Q Are there any minutes?

A There may be.

Q Was Leo Stern a partner at that time?

A I forget when Leo Stern died. Whether he had died at that point or not, I don't know.

MR. MANDEL: I will withdraw the question.

Q I think you were asked whether the Buckley claim was turned over to Persky to handle at some time. Do you recall that on direct?

A Yes, I do recall that.

Q Did you give an answer?

A I think I said yes.

Q When was that done?

A It had to be very late in '70 -- no, not very late in '70. I don't remember because I am trying to remember when Mr. Persky came into the picture.

Q Who authorized Persky to take over the claim, do you know? You said you don't remember when. Now who did it?

MR. SHAW: Objection, your Honor.

A I can only assume.

THE COURT: Overruled.

Q You don't know?

A I don't know. I can only assume.

Q So that your testimony that the claim was turned over to Persky was based on no knowledge of when or no knowledge of by whom, is that correct?

MR. SHAW: Objection, your Honor. That is argument. That is not a question.

THE COURT: I sustain that.

MR. MANDEL: I move to strike that prior testimony because it is now shown that it was not based on his personal knowledge.

MR. SHAW: Objection, your Honor.

THE COURT: I deny the motion.

Q At least can we agree on this: that there came a time when you learned of the settlement that had been made of the Buckley claim? Did there?

A I learned that a settlement had been arrived at.

Q When did you learn that?

A I don't recall.

Q Can you tell me within a year?

A Anywhere from the end of 1969 well into '70, to the best of my recollection.

Q Do you remember the transfer agreement that was executed on February 11?

A Yes.

Q Before that transfer agreement was signed -- by the way, it was signed by you, wasn't it?

A Yes, indeed.

Q Before you signed that transfer agreement, were you aware that theBuckley claim had been settled?

A I don't recall. I would imagine so.

Q Before you signed that transfer agreement were you aware that a complaint had been drawn up on behalf of the Newburger, Loeb partnership charging Charles Gross with churning theBuckley account?

A It rings a bell, but beyond that I can't specify.

Q Did you ever authorize Mr. Persky or anybody else to draw up a complaint charging Charles Gross with churning the Buckley account?

A Not that I recall.

Q Did there come a time when you became aware that part of theBuckley settlement involved the assignment of the churning claim from Buckley to the Newburger, Loeb partnership?

A I did.

Q When did you become aware of that?

A I don't recall.

Q Was it before or after February 11, 1971?

A I don't recall.

Q In 1966 did you hear from anybody that Buckley claimed he had been churned?

A I have no recollection.

Q In 1967 did you hear that?

A I have no recollection of hearing such.

Q How about 1968?

A Likewise.

Q What?

A Likewise.

Q How about in 1969?

A I don't believe so.

Q How about 1970?

A I am not 100 per cent sure.

Q Mr. Newburger, you identified the transfer agreement of February 11, 1970 yesterday, did you not?

A Yes, I believe I did.

Q That transfer agreement affected your rights in certain ways, did it not, your rights and your liabilitie is that correct?

A Yes, sir.

Q You gave up certain rights and you were relieved of certain liabilities, is that correct?

A That is correct.

Q And other parties to the agreement also gave up certain rights and certain liabilities under this transfer agreement, is that right?

A That is correct.

Q Now, are you familiar with the Peat, Marwick & Mitchell financial statement for the partnership at year e 1970?

A I have seen so many documents from them that naturally I am sure I have seen that, too. When you say am I familiar with it, I have seen it, I have read it.

Q According to that statement at year end 1970, how much money did you owe Newburger, Loeb?

MR. SHAW: Objection, your Honor. This has no relevancy to the churning claim.

THE COURT: No, I will overrule the objection.

MR. SHAW: Overruled?

THE COURT: Yes, overruled.

A I can't give the exact figure. Now, one reason that I can't give the exact figure and one reason that I have so often said to you I can't remember or I don't know is because these were horrible times for me and I have great difficulty sometimes remembering because I do try to strike them from my mind because it meant my financial demise.

Q Mr. Newburger, we don't have a problem. If there is enough light here --

A My best recollection is around 127,000 or something like that.

MR. SHAW: Your Honor, may I have a continuing objection to this question upon the ground that it relates to issues not related to the churning, but issues related to Mr. Mandel's affirmative claims which are supposed to not be involved here. The Court has ruled, but I merely call the Court's attention to the fact that this has no bearing on churning.

Mr. Mandel is now opening the door.

THE COURT: I agree that it doesn't, but I can see another ground or two on which it does.

MR. SHAW: It could relate to the Buckley claim in a fractional way, I suppose.

MR. GRUTMAN: What is the amount of the deficit?

THE WITNESS: It says 208,000.

THE COURT: The continuing objection is noted and overruled.

A I think when I said 127, I was talking about a statement about a month earlier.

MR. SHAW: Could I have the figure?

MR. GRUTMAN: 208,000.

Q Under the transfer agreement you were relieved of the duty to pay part of that money. How much did you actually pay?

A I paid whatever my full deficit was on the books.

Q Did you pay 208,000?

A I forget what I paid. I paid whatever the books at that t-me said I owed.

Q At this time?

A At the time that it was agreed that a fixed figure was taken for everybody. Whatever my deficit was at the time, I agreed to pay.

Q At what time?

A The time when we made the agreement, the transfer agreement.

Q February 11th?

A I have told you, sir, that I not only can't remember months somtimes, certainly on exact days --

Q Mr. Newburger, let's be very clear about this.

I am being as clear as I can.

Q I will try to refresh your recollection.

A All right.

Q And then you will see --

THE COURT: Just put questions, please.

Q -- if you will agree with me. I am trying to straighten out your recollection. This document shows what you owed as of December 31, is that correct?

MR. SHAW: Your Honor, that document should be marked.

THE COURT: It should be marked for identification at least.

(Defendants' Exhibit A was marked for identification.)

MR. SHAW: May I see it?

THE COURT: Are you in the course of using that exhibit?

MR. MANDEL: Just for this question.

THE COURT: Then give it back to him, Mr. Grutman. You can look at that exhibit later. At this point I would like not to interfere with counsel's questioning.

MR. GRUTMAN: Sorry, your Honor.

THE COURT: Go ahead.

Q Let me put it to you this way and see whether you will agree or disagree, Mr. Newburger. This document --

THE COURT: Exhibit A.

Q Exhibit A shows Peat, Marwick's calculation of your deficit at December 31.

A Is that what it says, December 31?

Q Yes.

THE COURT: Look at it.

THE WITNESS: I will accept it if Mr. Mandel says that is what it says. That is all right.

THE COURT: Do you represent that that is what it says?

THE WITNESS: That is fine.

MR. MANDEL: Yes.

THE COURT: Go ahead.

Q The number --

MR. SHAW: Your Honor, I have suggested to Mr.

Mandel that he show the document to the witness and ask the witness if it refreshes his recollection regarding the number. I object to reading in evidence portions of a document which is not in evidence.

THE COURT: That objection I will sustain.

MR. MANDEL: We have done it before.

A I have no problem with this, Mr. Mandel. It says here 208,321. However, I am not entirely sure, I don't believe that this was the cutoff date or the document that was used,to the best of my recollection in the transfer agreement.

MR. MANDEL: I move to strike that.

THE COURT: No, I will let it stand.

Go ahead.

Q Under the transfer agreement how much money did you pay into the firm or into the corporation?

THE COURT: Do you remember?

A You are talking about this or are you talking about fresh money?

THE COURT: Under the transfer agreement, did you pay money into the corporation?

THE WITNESS: Sir, I believe it was under the transfer agreement that I paid my capital deficit, but also paid a small amount of money to purchase stock in the new corporation. I was trying to differentiate between those two things.

THE COURT: Do you remember how much you paid on each item?

Q All right --

THE COURT: I have a question pending. Do you remember how much you paid?

THE WITNESS: I don't remember exactly. I believe to the new corporation it was $10,000, and I do believe that it was less than this figure of deficit, but that a different set of figures prepared by Peat, Marwick, Mitchell had been used by all who were according their capital accounts and taking care of their deficits either to some degree or entirely.

Q Mr. Newburger, we are going to get to this also.

A I think I recall --

Q One moment. I think it is coming now.

A In answer to your question, if I recall the figure that was used was -- the statement that was used for this particular purpose was one that was maybe a month prior to this rather than this.

Q But you did not pay $286,000 --

MR. GRUTMAN: 208.

A I do not believe I did.

Q You paid a smaller sum?

A Somewhat smaller.

Q About how much smaller?

A I don't remember. It might have been 120 or $130,000, or whatever, or 117 or 18.

THE COURT: I think we will recess for lunch at this point.

Ladies and gentlemen, we will stand in recess until ten minutes after 2:00.

Counsel stay for just one minute.

(Jury left the courtroom.)

THE COURT: Gentlemen, I have been thinking about my ruling with regard to speaking with a witness during the course of cross-examination. I adhere to my belief that it is obviously inappropriate and I am sure all counsel are fully aware of that, and will honor the fact that obviously one does not have any conversation with a witness bearing upon an effort to color or affect that witness' testimony in any way during the course of the cross-examination.

On the other hand, I think I am goinng to leave it to counsel to their discretion as to whether or not they do talk with their own or any other witness during cross-

THE COURT: Let me look at what the amendment is.

MR. MANDEL: Yes, I say at that time tomorrow when it is presented to you.

THE COURT: If you have serious legal and factual objections, I will hear them.

MR. MANDEL: Yes.

THE COURT: The problem you face with a case as long as this, if it is not a substantially affecting change, on principal it is to liberally allow such changes.

MR. MANDEL: I think it is barred by the statute of limitations.

MR. SHAW: That is another problem.

THE COURT: That is another problem altogether and if that is so --

MR. MANDEL: It is barred by the statute of limitations if it is brought now, that is the point.

MR. SHAW: The issue is whether the statute of limitations run from now or when the action was commenced.

(Jury present.)

ROBERT L. NEWBURGER resumed.

CROSS-EXAMINATION (continued)

BY MR. MANDEL:

Q Mr. Newburger, I think we were struggling with some numbers before we went out and I think you recall that the Peat, Marwick, Mitchell statement showed you were in deficit $208,321?

A As of a specific time.

Q As of December 31, 1970.

Now, I now show you Exhibit 24 in evidence, which is the transfer agreement signed on February 11, and ask you to look at paragraph D at the bottom of page 12 as to how much you are required to pay in satisfaction of your debt to the partnership.

A You wish me to read that out loud?

THE COURT: Does it refresh your recollection?

THE WITNESS: Right.

Q Tell me whether you have read it.

A I have read it.

Q Now, is your recollection refreshed that under the transfer agreement you were only required to pay $129,485 of the amount of your deficit?

A That is correct.

Q Will you check my arithmetic to show how much of that debt you were forgiven under the terms of the transfer agreement?

A Well, I don't know if I agree with your use of words. There is a computation that comes to 78,836.

MR. GLATZER: Objection.

THE COURT: I sustain the objection.

Q Let me ask it of you this way: Did you ever pay any sums other than the $129,485?

A I believe --

MR. SHAW: Objection,your Honor.

THE COURT: Overruled.

A I believe that the sum finally paid -- I am not 100 per cent right, but I believe it was not either of those two, but I think it was closer to the latter.

Q What sum did you actually pay?

A I don't really recall. Now,that was a long time ago and it came out of a tax refund and I paid it.

Q What record would establish how much you paid?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I am sure the records of the corporation as to what was received --

Q Did you sign a tax refund -- an assignment of tax refund at the closing on February 11?

A I don't know where I signed it. I did in fact sign such a thing, of course.

Q Is that the document that will establish the amount that you actually paid?

A No.

Q No?

A No. No, that will establish what my refund was, correct, unless I am confused.

THE COURT: Let's go forward.

Q I ask did you assign -- did you sign a document on February 11th assigning part of your tax refund to the corporation in satisfaction of your obligations?

MR. SHAW: Objection, your Honor.

THE COURT: Is it relevant as to the source of the money?

MR. MANDEL: It is a way of proving the amount, your Honor.

THE COURT: He said all that proved was the amount of the refund. We had an answer to that effect.

MR. MANDEL: What I am trying to prove, I know a little bit better, he says --

MR. SHAW: Objection to Mr. Mandel's testifying in front of the jury.

MR. MANDEL: I am trying to prove that the document says out of my refund so much is assigned to the corporation.

THE COURT: Why don't you ask him that question.

MR. MANDEL: All right.

Q Did the document that you signed on February 11th say that out of your total tax refund a certain portion was assigned in payment of your debt to the partnership?

A I don't recall whether it said that or whether it said whatever was required to satisfy my capital deficiency would be taken from it. Now, I don't know whethe it mentioned the exact figure or not. I am not trying to avoid the issue. If you can show me, fine.

Q Now, I am showing you -- is this marked in evidence?

MR. SHAW: I am not making any objection, Mr. Mandel.

Q I am showing you a document and ask you to look at it and see if you recognize your signature on it.

A I do.

Q Is that an assignment of a tax refund?

A Yes, it is, but not a complete assignment of it.

Q How much of your tax refund do you assign under that document? Is it 129,4 --

A I see that figure there, but I just want to satisfy myself that that is the paragraph that deals with it exclusively.

Q Yes, sir. Excuse me if I seem to be pressing.

A Yes, I think that is correct, sir. There is a provision here that any excess will be returned and that is what I wanted to read.

Q In what amount?

A I thought it would be in excess of my obligations, but in excess of the specific amount written here which is $129,495.

Q Will you now agree with me that as a result of this agreement, which is the transfer agreement signed on February 11,you were released from -- what is the number --

A 78,836, if in fact, sir, that was the exact amount when payment was finally made,because I am not convinced that that was the exact amount. I think it was a different amount. It might have been a few dollars less or more. It was near that.

THE COURT: You say it was near there?

THE WITNESS: It was hear that.

MR. MANDEL: All right.

Q Now, I would like to ask you another question, Mr. Newburger. Between the clearing house and the originating house, if there was a margin -- and I am talking about Gross & Company and Newburger, Loeb & Company -- if there was -- if an ongoing account fell into margin deficit who would bill the customer fot the deficit?

A Who would bill the customer?

Q Yes.

A Newburger, Loeb & Company.

Q If it was required to sell out the customer's securities because of a margin deficit, who would sell it out?

A Newburger, Loeb & Company. However, in both cases, as a practical matter, more often than not Newburger, Loeb & Company would consult with Gross & Company and tell them what problem they faced, hopefully in an effort to avoid the necessity for such a thing.

Q But the fact of the matter is, securities were in the name of Newburger, Loeb & Company so Newburger, Loeb was the only one who could actually sell them, right? Is that right?

A All right, if you wish to phrase it that way.

Q How would you phrase it?

A That Newburger, Loeb, not because it is in their name or anything like that, but under the clearance agreement would be the one who would technically make the move to sell it.

Q It wasn't technical, it was actual, wasn't it? Newbur ger, Loeb --

A Yes, all right.

Q Would actually sell the securities. The fact of the matter is there were certain regulations that required the sale of securities when margin maintenance deficit occurred, is that correct?

A That is correct.

Q What regulations were they?

A I can only tell you in general.

Q Yes.

A Reg. T., Reg. U, and any regulation of the New York Stock Exchange plus sometimes some in-house rules that we as a firm would have for ourselves.

Q And those regulations were binding on the clearing house, weren't they?

A That is correct.

Q Now, I am going to show you Mr.Shaw's exhibit, Plaintiffs' Exhibit 22, we will look at it together, and see if you will agree that this exhibit shows that May 15, 1969 was the first available date on which Westec was re-admitted to trading after it was stopped in 1966.

A Are you asking me if that is so or if that is what the exhibit says?

Q That is what the exhibit says.

A Yes.

Q I accept your answer. You don't know.

THE COURT: You have answered the question.

A All right.

Q Are you familiar with the setoff or claims that the Buckleys made against Newburger, Loeb & Company in 1970?

MR. GRUTMAN: We have already had this, your Honor.

A Only what I have heard in this courtroom and from having heard it in the courtroom. Never before.

Q Had you heard that one of their claims was their stock should have been sold out at the opening price?

A No,sir.

Q You never heard that?

A No,sir.

Q I will ask you one question more. Who in Newburger, Loeb on May 15, 1969, was charged to sell stock if such sale were required under one of the applicable regulations, Regulation T or U?

A That is not easy to answer with one name because cases of an ordinary nature the margin clerk in charge of that account would be entitled to get the wheels in motion.

In cases a little more severe, perhaps the head of the margin department,and anything of real import would have to be taken to the partner in charge of margin.

Q How about Leo Stern in 1969?

A He backed up Morris Newburger when Morris wasn't available. The margin department was Morris Newburger's department.

Q Morris Newburger died in '68?

A You are right. Leo Stern succeeded him.

MR. MANDEL: No further questions.

CROSS-EXAMINATION

BY MR. GRUTMAN:

Q In May 15, 1969, was Charles Gross a partner in Newburger, Loeb?

A Yes.

Q So on the date that the Westec stock was permitted to be resumed for trading, Charles Gross was working inside Newburger, Loeb & Company, is that correct?

A That is my recollection.

Q Do you know whether or not Charles Gross either made the decision or participated in the decision for the Westec stock in theBuckley account not to be sold on that day?

A I have no idea.

Q Was there a man who worked at Newburger, Loeb by the name of Goldstein?

top sheet, do you see Leo Stern's signature?

A That is Leo Stern's signature.

Q Do you see the date December 24, 1970?

A That is correct.

Q Does that refresh your recollection?

A It doesn't refresh my recollection, but it would appear --

THE COURT: That is an answer.

Q Do you recollect whether or not prior to December 24, 1970,you were consulted concerning the proposal made to settle that Buckley claim?

A I don't recall whether I was or not.

Q Would you take a look at the three sheets of paper --

THE COURT: Will you mark those for identification.

MR. GRUTMAN: Yes, I will.

These will be Finley, Kumble Exhibit A for identification.

xxx (Defendant Finley, Kumble Exhibit A was marked for identification.)

(Defendant Finley,Kumble Exhibit B was marked for identification.)

Q I show you first Finley, Kumble's Exhibit A for identification, a two-page memorandum, Exhibit B.

Would you first look at Exhibit A and read it to yourself.

(Pause.)

Q Have you read it?

A I have.

Q Is your recollection refreshed concerning whether or not you were consulted before the $50,000 settlement with theBuckleys was consummated?

A Obviously I was.

Q Now would you look at Exhibit B, Finley,Kumble Exhibit B for identification, which appears on a Newburger, Loeb letterhead.

THE COURT: Mr.Grutman, what is your question?

A I have scanned it.

Q Having scanned it, Mr. Newburger, does it refresh your recollection that you received a memorandum concerning the proposal of theBuckley settlement before it was concluded?

MR. MANDEL: Objection on the ground it is leading

MR. GRUTMAN: It is cross, if your Honor please.

THE COURT: Not necessarily.

Is your recollection refreshed?

THE WITNESS: Yes, but I didn't receive this.

Q If you will read -- do you recollect that Exhibit A for identification, which you do recall having received, had attached to it a memorandum, as is recited on Exhibit A also. You will notice, Mr. Newburger, Exhibit A is dated December 9. Exhibit B is dated December 7.

A I understand.

Q Exhibit A refers to a memorandum which is attached.

MR. MANDEL: I object.

THE COURT: Yes.

A I am sure I read it.

THE COURT: The question assumes facts not in evidence and the exhibits are not in evidence. I sustain the objection.

Q Do you recollect having seen Exhibit B for identification?

A I really don't.

Q Having looked at Exhibits A and B, can you tell us whether you have any recollection at all as to whether there was any consultation with you before the Newburger, Loeb settlement with theBuckleys was arrived at?

A I think I was informed rather than consulted.

Q Do you know whether or not somebody else within the management of Newburger, Loeb had decided that the case should be settled?

A I believe so.

Q Was that determination made by Newburger, Loeb communicated to Newburger, Loeb's then lawyers, Finley, Kumble?

MR. MANDEL: One, I object. The question calls for hearsay information. The question should be if this witness knows.

THE COURT: Let me hear it.

(Question read.)

THE COURT: Do you know?

THE WITNESS: At some time I know it was.

Q And if was Finley, Kumble --

MR. MANDEL: Please let him finish.

MR. GRUTMAN: I thought he had.

A At some time.

Q Did you learn that on behalf of Newburger, Loeb and pursuant to its instructions the settlement was consummated?

A Yes, I knew a settlement had been consummated. I couldn't place the time or the instruments.

MR. GRUTMAN: Thank you very much.

MR. MANDEL: May I have those pages for a moment.

MR. GRUTMAN: Just a moment.

DAVID W. BUCKLEY, called as a witness by plaintiffs, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Buckley, where do you reside presently?

A In Rumsen,New Jersey, 82 West River Road.

Q How long have you lived there?

A 12 years.

Q Are you married?

A Yes, I am.

Q What is your wife's name?

A Marie S.

Q Do you have any children?

A Yes, I do. Yes, we do.

Q I am sorry, how many children do you have?

A Five.

Q What are their ages?

A The oldest is 26, 14, 12, 11 and 9.

Q Are you presently employed?

A Yes, I am.

Q In what capacity?

A I am president of my own company.

Q What is the name of that company?

A In-Store Publications, Inc.

Q Is that an active company or is it in the process of liquidation?

A It is neither.

MR. MANDEL: Is this relevant, your Honor, what Mr. Buckley is doing now?

MR. SHAW: I think it is all relevant, your Honor.

THE COURT: I will take some background, yes.

Overruled.

Go ahead.

Q You say it is neither active nor in liquidation?

A That is correct.

Q Can you explain that, sir?

A The company, as I said, is In-Store Publications. We published a magazine that ceased publication about a year ago, so the company is not active nor is it in liquidation. It is an inactive corporation. I would call it an inactive corporation.

Q Now, other than your present connection with this company by the name of, I think you said, "In-Store Publications?

A Yes.

Q Other than your connection with that company, eob-149 Buckley-direct

at the present time do you have any other employment?

A No, I do not.

Q WEre you formerly employed by Lever Brothers?

A Yes, I was.

Q During what period of time were you employed by that company?

A From 1953 through 1971.

Q In what capacity had you been employed by Lever Brothers?

A Various levels. Do you wish them all?

Q Was there one main area of your responsibility there?

A Operations.

Q What do you mean by "operations"?

A As a consumer goods company, a subsidiary of a worldwide organization, we were responsible, the company was responsible for the research and development, the manufacture, the distribution, advertising and sales of a long list of consumer goods products.

Q What was your specific job?

A At what point in time?

Q In 1971.

A I was a vice-president of the company.

Q In what area were you involved?

A I was in charge of their foods division.

Q When you left Lever Brothers, were you earning the highest salary that you earned while you were employed at Lever Brothers?

A Yes, I was.

Q What was that salary?

A Is that required?

Q Pardon me?

A Is that pertinent, required?

Q Are you embarrassed to say?

A I think it is privy to the company and myself, yes. I say yes. I may not be embarrassed, but it is privy to other people other than myself.

Q Let me ask you this question: Was it more than thirty per year?

A Yes, it was.

Q Considerably more?

A Are you talking salary or total remuneration?

Q Salary from Lever Brothers.

A It was considerably more, yes.

Q In 1966 what was your salary from Lever Brothers?

A I still consider the information privy to them and myself. If the Judge instructs me to give it, I will give it.

Q I would like to press you for the answer to that question, sir, if you don't mind.

THE COURT: Mr. Buckley, I believe at some point it is going to become relevant to this inquiry, so I would direct that you answer.

A In 1966?

Q '66.

A About $30,000 per year, salary.

Q Can you recall in 1962 what your salary from Lever Brothers was approximately per year and again I press you for the answer, sir.

THE WITNESS: Again, your Honor?

THE COURT: Yes.

A About $15,000 per year.

Q Did you say $50,000?

A $15,000 per year salary.

Q This is 1962. How many children did you and your wife Marie have?

A 1962, we had two.

Q WEre more children born between you and Marie between 1962 and 1966, sir?

A Yes.

Q How many children did you and Marie have in 1966?

A Five.

Q Do you know a man by the name of Charles Jordon?

A Excuse me, what do you mean by "do I know"? Have I met?

Q Did you ever meet him?

A Yes, I have.

Q When did you first meet him?

A In 1959.

Q Where did you first meet him?

A I met him at his brokerage house.

Q Do you remember the name of that brokerage house?

A I met him on the premises of Hayden,Stone. I assumed he worked for Hayden, Stone & Company at 54th and Park Avenue.

Q Did there subsequently come a time when you had an account with the brokerage firm of Goodkind, Neufeld & Jordon?

A Yes.

Q Was Mr. Jordon the Jordon in that firm?

A As I understand it, yes.

MR. MANDEL: May we fix a time for that?

Q Was this prior to 1962 that you had an account with Goodkind, Neufeld & Jordon?

A Yes.

Q Did there come a time when you and your wife

Marie had an account at Gross & Company?

A Yes.

Q Do you know Charles Gross?

A No, I do not know Charles Gross.

Q Did you finish the answer to the question?

A Again your clarification of the "know"?

Q Have you ever met the man?

A Yes, I have.

Q When did you first meet him?

A To the best of my recollection in this courtroom.

Q Have you ever met Mabel Bleich or Jeanne Donoghue?

A Mrs. Bleich I believe I met. To the best of my recollection, yes, I have met Mrs.Bleich. Mrs. or Miss Donoghue, I have no recollection of meeting.

Q I would like you to look at Plaintiffs' Exhibits 19 through, I believe the number is 21, --

MR. MANDEL: Excuse me, do you mean 9 through 21?

MR.SHAW: I meant 9. You are absolutely right. I stand corrected, and I thank you.

Q 9 through 21.

MR. SHAW: Do you have number 18, Mr. Mandel?

MR. MANDEL: What you are showing Mr.Buckley are Newburger, Loeb ledger cards.

THE COURT: Plaintiffs' Exhibit 19 is the question?

THE WITNESS: I will search these.

Q Mr. Buckley, I askyou whether you are the David Buckley referred to in these ledger cards or copies of ledger cards?

THE COURT: I gather his answer is going to be "I assume so."

MR. SHAW: We have gone over them this morning, your Honor.

THE COURT: These are not records made or kept by him. He didn't prepare them, he just knows his name is on them.

MR. MANDEL: We will take your representation and stipulate.

Q I would rather have the witness' testimony.

A Repeat your question.

Q Are those ledger cards that pertain to you and your wife Marie?

MR. MANDEL: Now I am going to object since Mr.Shaw is being so sticky. They are not his records. Has he ever seen them before. Does he know? Can he tell?

THE COURT: What is his connection with them?

Q Did you receive copies of the ledger cards of Newburger, Loeb each month summarizing the activity in your account and the position in your account each month?

A Each month I received what I have always called statements, but the nomenclature"ledger cards" is fine. I did receive statements monthly summarizing the activity in the account and the final balance, and etc.

Q Have you and I reviewed these documents together this morning?

A Yes, we have.

Q From your review of these documents this morning, do you know that these documents pertain to your account?

A Do I know?

Q Yes.

A No, I don't.

Q You can recall that these transactions pertain to the purchases and sales by you of securities?

MR. MANDEL: Objection.

THE COURT: Sustained. He says he doesn't know.

Do you recognize these as copies of statements that you got or do you not recognize them?

THE WITNESS: I recognize the form, but every entry on them I certainly don't keep in mind.

MR. MANDEL: The statements are here and the statements are different from ledger cards.

THE COURT: Yes, I understand.

Q Do you recognize these forms?

THE COURT: He says he recognizes the form, but not their content, Mr. Shaw. He is accepting your statement that they are what they are if I understand him correctly.

Is that right, Mr. Buckley?

THE WITNESS: Yes, sir.

Q Mr.Buckley, looking at the first page of Exhibit 9, does the first page of Exhibit 9 reflect a long position in your account and activity in your account in or about December of 1962?

A These statements say they do.

Q Can you recall that they do or do not?

A I recall?

Q Yes.

A No.

THE COURT: Recall what?

Q Do you recall the purchases and sales that you made of stocks in 1962 being as reflected on the first page of Exhibit 9?

A Would you repeat the question?

MR. MANDEL: Excuse me, may I interrupt for a second?

THE COURT: If you have an objection, I will hear it.

MR. MANDEL: I am trying to be helpful.

MR. SHAW: I have heard that so many times, your Honor.

MR. MANDEL: We have the copies of Mr. Buckley's actual statements with which Mr. Buckley I presume is familiar, and it might make everything a lot easier.

THE COURT: All right. Now you have made that statement, now, Mr.Shaw, do you want to accept that or do you want to go forward?

MR. SHAW: They are certainly a lot more legible than our copies.

THE COURT: Let those be marked as defendants' next exhibit for identification.

xxx (Defendants' Exhibit B was marked for identification.)

MR. SHAW: Mr. Mandel, whose handwriting appears on this?

MR. MANDEL: I don't know of anybody's. Let's take a look. You might ask the witness.

Q Is that your handwriting?

A Are you asking me a question?

Q Whose handwriting appears here?

A Mine.

THE COURT: Mr. Mandel, would you and Mr. Shaw come up here for a minute, please.

(At the bench.)

THE COURT: Where did you get Exhibit B from, fro the witness on a deposition?

Is there any reason this can't go in?

MR. SHAW: The only thing is I have never seen it before. I have just made a spot check. It looks as if it is a duplication of what I have. It looks as if it is a lot more legible.

THE COURT: Mr. Shaw,he is not going to accept what you have, 9 through 21, he doesn't know anything about, and he has made that perfectly clear. All I am trying to do is if he has produced this and the deposition says --

MR. MANDEL: He gave us his records and I believe somebody in my office produced this.

MR.SHAW: Are they intact?

MR. MANDEL: As far as I know.

MR. SHAW: Subject to my reviewing these and making sure, I have no objection.

THE COURT: I understand.

(In open court.)

BY MR. SHAW:

Q Mr.Buckley, will you tell the Court and the jury what Defendants' Exhibit B in evidence is?

MR. SHAW: In evidence, Mr. Mandel?

MR. MANDEL: If you offer it, it is all right with me.

THE COURT: Any objection from anybody else?

MR. GRUTMAN: I don't know what it is. Could I see it?

Thank you

(Pause.)

Your Honor, have these been identified as being something?

THE COURT: Between Mr.Shaw and Mr. Mandel, it has been stipulated those were marked as Mr. Buckley's statements on two depositions.

MR. GRUTMAN: So these are Xerox copies of the monthly statements held by Mr.Buckley.

THE COURT: That is what counsel represents.

MR. MANDEL: That is what I believe. I think the originals are here.

THE COURT: There being no objection, they will be received in evidence. Defendants' Exhibit B.

(Defendants' Exhibit B was received in evidence.)

Q Mr.Buckley, in looking at Defendants' Exhibit B in evidence will you tell the Court and the jury what these documents are?

A They would appear to be statements from Newburger Loeb & Company with the legend account carried by arrangement with Gross & Company. The first page of which is a statement covering a two-month period for my name. That is about all I could say.

Q Mr.Buckley, is there any question that Exhibit B sets forth the purchases and sales of stocks in your account at Gross & Company carried at Newburger, Loeb & Company?

MR. MANDEL: I object to the form of that question.

MR. SHAW: Let me break it up. I withdraw the question.

Q Mr.Buckley, is there any question that these documents reflect a brokerage account maintained by you?

A Is there any question?

Q Is that your brokerage account?

A I don't know. These are copies that have been put in evidence as something that was picked up from me several months, if not years ago, and I don't know whether they are true copies of what was taken from me or not.

Q Did you turn it over to Mr. Mandel?

A No, I did not.

Q Did you turn those documents over to anybody?

A Yes, I did.

Q Who?

A My attorney.

Q Who is your attorney?

A Webster, Sheffield, Fleischmann, Hitchcock & Robinson.

Q Do you recognize those as documents that you turned over to your attorney?

A I am looking at the first page.

Q The first page --

THE COURT: Mr.Shaw, please.

Q Mr. Buckley, do you know where you got the documents from,that you turned over to your attorney?

A I turned statements and confirmation slips that I received periodically from Newburger, Loeb & Company.

Q So you got those documents from Newburger, Loeb?

A Yes, I did.

Q Did you have an account at Gross & Company?

A I don't understand the technical part of the question. As far as I know my account was with Newburger, Loeb, carried by arrangement with Gross & Company. What that means legally I couldn't comment.

Q Who was the customer's man who handled that account?

A Charles Jordon.

Q During what period of time did you maintain that account?

A With Gross & Company through arrangement with Newburger, Loeb & Company from mid-1962 through, I believe I received statements, to the end of 1970.

Q The Mr.Ryan that you mentioned, was he with Webster, Sheffield?

A I met Mr. Ryan, I believe, in 1966. Whether he was with Webster, Sheffield prior to that I don't know.

Q Did there ever come a time when Mr.Ryan was with Webster, Sheffield?

A I just said he was with them in 1966.

Q Did he represent you in litigation or a dispute or an arbitration with Newburger, Loeb?

A He represented me in an arbitration.

Q In connection with that arbitration, did you prepare a summary of the activity in that account reflected by Exhibit B?

A Yes, I did. Excuse me, I don't know that it is reflected by Exhibit B.

MR. SHAW: We will get into that.

MR. GRUTMAN: Here it is.

MR. SHAW: May I have the last question and answer read back.

(Record read.)

Q Mr. Buckley, I show you what has been marked Plaintiffs' Exhibit 23 for identification and ask you if you recognize this as a summary prepared by you?

A Yes, I do.

Q When did you prepare the summary reflected in Exhibit 23?

A December 15, 1966.

Q Did you prepare that summary upon the basis of certain documents?

A Yes.

Q Upon what documents did you prepare that summary?

A To my best recollection my income tax statements.

Q Were your income tax statements prepared upon the basis of the records of your purchases and sales of securities?

A Indirectly, yes.

Q Does the summary therefore summarize your purchase and sale of securities during the period 1962 through 1966?

MR. MANDEL: I object on the ground that it is leading.

THE COURT: It is leading, but it has been led, so overruled.

Go ahead.

THE WITNESS: Could you repeat the question, please?

THE COURT: Yes.

I will sustain the objection now and you may put it in less leading form.

What does that piece of paper purport to contain, Mr. Buckley?

THE WITNESS: It purports to contain on the top a listing as of December 15, 1966, a personal balance sheet of my assets and liabilities, again as prepared by myself, and underneath that a summary of the transactions from the years 1962 through and including 1966, with Newburger, Loeb, and severl columns including the number of transactions per year, the total dollar sales per year, the cost of transactions per year, the resultant profit and loss, the total dollar transactions for that year, the cash in the account for that year, and in addition a summary at the bottom which, as pointed out earlier, has an arithmetic error,also prepared by me.

Q With the exception of the error, is that a true summary of your purchase and sales of securities during the period reflected in that schedule?

A Yes, it was.

MR. SHAW: I offer this document in evidence, your Honor.

MR. MANDEL: May I see it?

MR. SHAW: I have already shown you a copy of it.

MR. MANDEL: No, you have not.

Mr. Shaw, will you give us a XErox of this?

MR. SHAW: Yes.

MR.MANDEL: Based on Mr.Buckley's testimony, I have no objection.

MR. GRUTMAN: Here is your Xerox.

MR. MANDEL: Thank you.

MR. GRUTMAN: You are welcome.

THE COURT: It will be received.

MR. GRUTMAN: Your Xonor, I have an enlargement of that which I would like to put on the blackboard.

(Plaintiffs' Exhibit 23 was received in evidence.)

THE COURT: I take it this is Mr.Shaw's examination and not yours.

MR. SHAW: Your Honor, if I could, I would like to have that scotch-taped to the blackboard.

THE COURT: You propose at this moment to ask questions about it?

MR. SHAW: Yes.

MR. GRUTMAN: Can I make a change?

MR. SHAW: Yes.

THE COURT: Wait a minute.

MR. GRUTMAN: The change is on the original, your Honor.

THE COURT: Just hold on for a minute.

Q Mr. Buckley, is there an arithmetic error in the column captioned "Total transactions"?

A Yes.

Q What is the arithmetic error, instead of nine million three hundred and twetny-nine, it should be ten million, three hundred and twenty-nine?

THE COURT: Have you made that on Exhibit 23?

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Q Would you make that change, sir?

A If someone would like to check my arithmetic.

Q Mr.Buckley, does the column to the left captioned "Assets" correctly set forth your assets as of December 15, 1966?

A To the best of my recollection, yes.

Q As of that point did you have approximately $4500 in cash?

A I believe the number is 5000.

Q Is there a line through that and $4500 on top of it?

A There is something written there. I can't reall read. If it says 45, I assume it is 45.

Q You had a house at that time worth $150,000?

A House and property, yes.

Q At that point did you own certain Westec stock?

A Yes.

Q By "you" I mean you and your wife Marie, correct?

A Yes.

Q Was any of that stock also owned by any of your children?

A No.

Q Was, of that point, December 15, 1966 -- what was the value of the Westec stock?

A As far as resale goes it was valueless.

Q Zero?

A As far as resale on that date, yes.

Q In addition didyou at that point own 48,000 shares of Georgia Pacific stock?

A 48,000?

Q 48,000.

A No.

Q $48,000 worth of Georgia Pacific stock.

A That is what my statement says. I assume it is correct.

Q Was the source of that Georgia Pacific stock your father?

A My father or my mother.

Q At that point did you have liabilities which included a liability in the amount of $257,000 owed to the Scarsdale Community National Bank?

A No, the Scarsdale National Bank.

Q I am sorry, the Scarsdale National Bank.

A Yes.

Q At that point did you owe $75,000 to Chase Manhattan Bank?

A Yes.

Q And di you owe $17,000 --

A To Monmouth County National Bank.

Q Did you have a first mortgage on your home?

A Yes, I did.

Q Was that in the amount of $90,000?

A Yes.

Q At that point did you owe money to Newburger, Loeb & Company?

A Yes, I did.

Q How much was that?

A $289,000.

Q Did you also owe money to Merrill Lynch?

A Yes, I did.

Q How much did you owe to them?

A $35,000.

Q So your total liabilities were $766,000, correct?

A That is correct.

Q During the year 1962, did you have any transactio in your account -- withdrawn.

During 1962, did you issue orders with respect to the purchase and sale of securities in the account of Marie Buckley?

A I would have to refer to my records.

Q Would you care to do so, sir?

A Yes, I will. May I used Exhibit --

Q Whatever you need to refresh your recollection, go ahead.

A B. In 1962, in the account of Marie, is that your question?

THE WITNESS: Could I have the question again, please?

THE COURT: Did Marie have an account in 1962?

THE WITNESS: No, she did not.

Q In 1962 did you have a tax loss carry-forward of any amount?

A May I refer to my records?

Q By all means, sir.

MR. SHAW: Mr. Mandel, do you have any objection to Mr.Buckley referring to his records whenver he needs to to answer any question.

MR. MANDEL: Certainly not.

Q Please feel free, Mr. Buckley, to look at your records to answer any of these questions.

A Thank you. 1962?

Q Yes.

A Was there a tax loss forward into the year or out of the year, I didn't hear that.

Q Into the year.

A No, there was not -- excuse me, I was reading the wrong line. Yes, there was.

Q How much was the tax loss carry-forward?

A Into 1962 there was $13,466.

Q Did you ever have a conversation with Mr. Jordon in which you advised him that you had a tax loss carry-forward of approximately $500,000 when this account was opened or at any time?

A No.

Q Did you ever have a tax loss carry-forward of $500,000?

A No.

Q In 1963 did you have any conversation with Mr. Jordon with respect to what your assets and liabilities were?

A In 1962?

Q Yes.

A Not that I recall.

Q At any time prior to 1962 did you ever have any conversation with Mr. Jordon as to what your assets and liabilities were?

A Not that I recall.

Q In 1963, excluding your home, did you have a positive net worth or were you in a deficit net worth position?

MR. MANDEL: Excuse me. May I have that question back?

THE COURT: Yes, you may. REad it.

(Question read.)

MR. MANDEL: I object to the form.

THE COURT: Sustained.

Q Can you recall approximately what your net worth, if any, was at the beginning of the year 1962?

A No, I do not.

Q At the beginning of the year 1962 would it be correct to say that you had hundreds of thousands of dollars to invest?

A Would it be correct? No, that would not be correct.

MR. SHAW: Could I have the question read back, your Honor?

THE COURT: Well, I was going to sustain an objection to it, so I really don't see much point. This is direct examination of this witness.

MR. SHAW: All right.

THE COURT: It seems to me that is a little far afield.

Go ahead.

Q Mr. Buckley, prior to 1962, you had had an account with Goodkind, Neufeld & Jordon, correct?

A That is correct.

Q Prior to 1962 did you have a brokerage account at any other brokerage company?

A Yes, I did.

Q What was the name of that company?

A Merrill Lynch.

Q Merrill Lynch?

A Pierce, Fenner & Smith, and I also had an account prior to 1959 when I first entered the market with another brokerage firm. I do not recall the name of the brokerage firm.

Q In 1962 how old were you?

A In 1963 I was 31 years old.

Q In 1963 did you receive from your father or your mother certainGeorgia Pacific shares of stock?

A I assume that I did. I don't have those records

Q Can you recall approximately how many shares or what the value of the Georgia Pacific stock which you received in 1963 from your father and your mother was?

A I believe $5000.

Q $5000 for you, correct?

A That is correct.

Q Did your wife receive some shares?

A I am reasonably sure.

Q $5000 for her as well?

A Yes.

Q Did your children receive some shares?

A I am reasonably sure, yes.

Q $5000 for each one of them?

A I can verify that with my records if you want to be sure.

Q Just to summarize it.

MR.MANDEL: I am going to object for one reason. 5000 is ambiguous. I think it should be 5000 of market value or basis value. I think it makes a very big difference.

Q That is what I mean, 5000 of market value. I am willing to stipulate --

A At the time the gift was made, yes.

MR. MANDEL: It was worth $5000 in the market?

THE WITNESS: At the time the gift was made.

MR. SHAW: I think Mr. Mandel knows the answer and with is courtesy perhaps I will ask a leading question.

Q In fact, for every year before that, as well as after that, your parents had been in the habit of giving you and your wife and your children $5000 market value of Georgia Pacific each year for tax purposes?

A No, that is not correct.

Q Had your parents been in the habit of giving you $5000 each year of stock?

A For what period of time, Mr.Shaw?

Q For the period 1962 through 1966.

A Yes, they had.

Q And had they begun that procedure prior to '62?

A I believe so. My memory is not that precise.

Q So for several years prior to '62 they had been doing this, correct?

A A gift to me.

Q And a gift to your wife and to your children?

A I believe to my wife. My children is what I referred to before as checking my records, if you would like to know with precision about it.

Q What would you do with the Georgia Pacific stock that you got?

A During what period of time?

Q During '62.

A I would say that I would deposit it either at a brokerage house or put it in my safe deposit box.

Q Did you take the stock and deposit it in Merrill Lynch and sell and sell it and put it in the Gross & Company --

THE COURT: Sustained as to leading. There has been quite a bit of leading. Mr. Shaw, this is direct examination. The objection is sustained.

MR. SHAW: I am sorry, your Honor.

Q Mr. Buckley, in the year 1962, did you purchase approximately $436,322 worth of stock in your account at Gross & Company?

MR. MANDEL: I object as leading.

THE COURT: Well, we are now referring to an item that is on that statement.

MR. MANDEL: Mr.Buckley can be asked to interpret what it means.

MR. SHAW: This is also preliminary to the question of where did the money come from, your Honor, to fund this transaction.

THE COURT: Given the format, I will overrule the objection at this particular time.

MR.MANDEL: I will try to straighten it out on cross.

THE COURT: What is your answer?

A Would you please repeat the question.

(Question read.)

A No, I did not.

Q What were the totals of the transactions in your account at Gross & Company for the year 1962?

A 436,322.

Q How much cash did you have in your account during 1962?

A If I am reading that correctly, '63, 717.

Q What was the cost of the stock which you purchased?

A 224,129.

Q Was that a margin account?

A I would have to refer to Exhibit B.

Q Please do so.

A Would you repeat the question, please.

(Question read.)

A There was more than one account. One account was a margin account and one account was a cash account, so the answer to your question is no, it was not a margin account.

Q Some of your accounts were margin accounts?

A Yes, there were.

Q During the year 1962, what was the amount of your indebtedness to Newburger, Loeb upon your margin account?

A In the year 1962?

Q Yes.

A Mr. Shaw,may I ask for clarification. Do you mean during the year, the high point, the low point or at the year end?

Q The high point, let's take that.

A Okay. May I ask another question before I answer. These Xeroxes are in black and white. As I recall the statements from Newburger, Loeb, the debit balances are in black and the credit balances are in red, and this does not picture color, and unless your comment about italics holds, I can't answer.

MR. MANDEL: We have the originals here, I believe.

THE WITNESS: Pardon me.

MR. MANDEL: We have the originals here, Mr. Buckley, if that will be helpful.

THE WITNESS: Are they in order?

MR. SHAW: If it is red it is italicized and if it is not, it is not.

THE COURT: Let's not have a confab up here. Either you use those or not. I take it, Mr.Shaw, you don't want to use those originals?

MR.SHAW: Only because it is a duplication for the third time of what we have,your Honor.

THE WITNESS: Except for the color red and black.

MR. SHAW: I think Mr. Mandel would be willing to stipulate that although on the originals the color red means a credit,and the color black means a debit, that where the printing is italicized that is the equivalent to red. Am I right, Mr. Mandel?

MR. MANDEL: So stipulated.

THE COURT: All right.

THE WITNESS: Could I rephrase the question or should I ask you. You need the high point of the debit balances in the year 1962.

MR.MANDEL: Could you just speak up just a little bit. I am not as young as I used to be, and it is a big room.

THE WITNESS: I am expected to examine the recor Exhibit B for the high point of the debit balance in the margin account for the year 1962, in my account?

The number that I have, Mr.Shaw, is $77,046.87 on August 28 --

MR.MANDEL: May I have that again?

THE WITNESS: August 28, 1962, $77,046.87.

Q On August 28, 1962, let's pick this date as an illustration. Do your records reflect your purchases and sales of stocks on August 20th through August 31st of 1962?

A Do my records?

Q Yes, the records before you, Exhibit B.

A Exhibit B are true copies of my records, they do.

Q On that day, August 20, did you have a debit balance?

A Did I?

Q Did you?

A Yes.

Q What was the debit balance?

A $51,107.87.

Q That was a sum of money that you owed Newburger, Loeb?

A Yes.

Q On that day did you engage in a transaction?

A No, I did not.

Q On the following day, August 21, did you engage in a transaction?

A Yes, I did.

Q Did you on that day purchase 200 shares of United Financial Corporation of California?

A Yes.

Q Did you receive a stock dividend from Litton Industries?

A On that day , no. On the following day, yes.

Q On August 23 or August 24 did you purchase 200 shares of American Research & Development?

A Yes.

Q 100 shares of Bell & Howell?

A Yes.

Q Another 200 shares of Bell & Howell?

A Yes.

Q 100 shares of Helene Curtiss?

A Yes.

Q Another 100 shares of Helene Curtiss?

A Yes.

Q 200 shares of S. Klein Department Stores?

A Yes.

Q And as a result of that purchase did you increase your debit balance to the sum of $2,615.07?

A As a result of that purchase less the sale also recorded on that day.

Q You sold 100 shares of Litton Industries?

A That is correct.

Q So your debit balance was how much, sir?

A $62,615.07.

Q Upon whose recommendation did you make that purchase?

MR. MANDEL: Which purase?

Q The purchase I have just referred to.

A Purchase.

Q On August 24, August 23, 1962?

MR. MANDEL: The series of purchases?

Q Correct.

A To the best of my knowledge Mr. Jordon's.

Q During the period reflected in that schedule, '62 through '66, there are, according to your summary, 1110 transactions and a total purchase of approximately $10,000 in transactions -- $10 million of transactions. Out of all those transactions how many transactions did Mr. Jordon suggest to you?

A Somewhere between 800 and 900.

Q Out of those transactions how many were your suggestions?

A I assume the balance.

Q During this period of time, 1962 through 1966, were you in telephonic communication with Mr. Jordon?

A Yes.

Q How frequently?

A How would you like the answer, per week, per day?

Q In your words, the best way you can tell it to the Court and to the jury.

A From the period 1962 through 1966, starting at the beginning in 1962, probably an average of about 10 telephone calls, him to me, or me answering his call or me initiating a call, about ten times a week in 1962.

By the end of the period, as the activity picked up or during the period as the activity picked up, probably an average about six or seven a day, I'd say.

The period in 1964, and decreasing amounts in 1965 and 1966, and after September of 1966, probably very little.

Q Mr. Buckley, getting back again to this period in August of 1962 where your debit balance, I believe, was approximately $82,000, can you recall?

A August of '62?

Q Yes.

A Debit balance of '62?

Q Right.

A I must be reading a different page. I have '71. What was the number?

Q $62,000.

A Yes, 62 --

MR. MANDEL: I am sorry, Mr. Buckley.

A Excuse me, the answer was yes, $62,615.07.

Q Now, is it correct that betweenAugust 25 and

August 24, your debit balance increased from $46,807 to $62,615?

A Yes.

Q So you debit balance increased by approximately $16,000 by virtue of transactions in one day, is that correct?

A Yes, in one day.

Q In one day you bought$16,000 worth of stock on margin, correct?

A No.

Q In what respect is my statement incorrect?

A Again I bought securities on that day less the sale of Litton Industries on that day, which resulted in a net increase in the debit balance of $16,000, but there also was a sale on that day.

Q So really you purchased securities of approximately $21,000 on that one day and sold securities on that day of about $6,000?

A That is correct.

Q What was your salary in 1962?

A 1962 also, I believe it was about fifteen to $20,000.

Q Now, other than the $5000 worth of Georgia Pacific stock that you and your wife, and I think your two children at that time were receiving from your mother and father and other than your income as salaried employee of Lever Brothers, and other than what you could earn hopefully through the purchase and sale of securities, at that time in 1962, did you have any other source of income?

A No.

MR. SHAW: Your Honor, I note it is 4:30, and rather than start another point, I would like to recess now if I could, and I might indicate that the deposition of Mr. Buckley can't conclude in just a few more minutes -- the testimony of Mr. Buckley can't conclude in just a few more minutes. It will be rather more substantial.

THE COURT: Can you go perhaps another 10 or 15 minutes to make up for yesterday.

MR. SHAW: Certainly.

Excuse me a moment.

THE COURT: You are prepared to continue the examination, aren't you?

MR. SHAW: Yes.

THE COURT: Then let's go.

Q Mr. Buckley, I would just like you to look at the top of Plaintiffs' Exhibit 9 in evidence. The upper left-hand corner shows your long position at the end of I believe this is November of 1962, does it not?

A I think that says November.

THE COURT: Mr. Shaw, is this just going to be a reading from this exhibit?

MR. SHAW: No, just an explanation and another point.

THE COURT: This is an exhibit that he says he doesn't know anything about except what it says on its face.

MR. SHAW: That is why I am suggesting he told B in his hand. He is looking at B and I am looking at 9.

THE COURT: What is the basic question?

Q What was your long position as of the end of the year 1962?

A I don't mean to be --

Q In Account 65250.

A I don't mean to be doubting, but just assuming the fact that these records are true copies, my long position was two shares of Paddington Corporation A, 1500 shares --

THE COURT: You are reading from a page?

THE WITNESS: Yes.

THE COURT: We don't need that.

Q Just looking at your long position at the end of the year 1962, are there any shares which you owned at the end of that year which were purchased by you at your own suggestion rather than the suggestion of Mr.Jordon and, if so, tell us what those shares were.

A At the end of the year?

Q Yes.

MR. MANDEL: Excuse me. I may have missed the question.

THE COURT: The question is whether anything that was held in that account as of the end of the year --

MR. MANDEL: On that day, but not during the year.

THE COURT: Was his suggestion or Mr.Jordon's suggestion.

MR. MANDEL: On that day.

THE COURT: This is the closing balance at the end of '62.

A In that one account, Mr. Shaw?

Q Yes.

A In that account no, there were not any purchases as a result of my order or suggestion.

Q At that point you were long various shares and you owed Newburger, Loeb $51,346.73, correct?

A That is not correct, but it is basically the number. You are reading November and you asked for the end of the year. There is a December statement following.

Q Give or take a few dollars.

A In Exhibit B, the statement for December 31, 1962, lists 150 shares of Georgia Pacific Coal, which is crossed out. Georgia Pacific Coal is not a coal. I assume it means Georgia Pacific Corporation, which was not purchased as a result of Mr. Jordon's suggestion. They were securities I evidently transferred to him.

Q This transfer of Georgia Pacific stock, 150 shares of that stock, was that stock that you got from your family?

A It would appear so.

Q Worth approximately $5000?

A I would not be able to say at this point what it was worth at that point.

Q Is it correct that you were getting the money to buy the stock at Mr.Jordon's recommendation from the sale of the Georgia Pacific stock?

MR. MANDEL: I object to that question.

THE COURT: As leading. Sustained.

MR. MANDEL: It also misstates the evidence.

Q Will you tell thejury and the Court what the source of the money used by you to purchase securities from Gross & Company, clearing through Newburger, Loeb & Co., during the year 1962 was? What was the source of the money?

A To the best of my recollection there were two sources. One was the sale of Georgia Pacific. There were three sources. One was the sale of Georgia Pacific stock that had been given to me as a gift by my parents. The second might have been,although I can't tell from these records, might have been borrowing against the Georgia Pacific stock at these brokerage houses, you are allowed to borrow trading money if you will, if you place securities in the account,and the third was my salary.

Q When you are talking about borrowing against stock, you are referring to a margin account, are you not?

A That is correct.

Q Now, have you made a computation for the year 1962 with respect to the ratio between the cash in your account and the value of the stock purchase in that account for that year?

A A computation between the cash in the account and the amount of stock purchased at year end I would assume is included on that first line.

Q What is the ratio approximately?

A Purchases to cash about 4:1, 3-7/10:1 cost over the cash, so 3.7 times the cash would be the cost of the purchases.

Q Did you make a computation for the purpose of showing -- withdrawn.

Did you make that computation and give that computation to your attorney, Mr. Ryan?

A Yes, I did.

Q Did you make a computation with respect to the ratio between the cash in your account and the investments for each succeeding year?

A Through 1966, yes.

Q What was the highest ratio?

A About 26:1.

Q What year was that?

A 1964.

Q In other words, with approximately one dollar of cash,you were out purchasing $26 worth of stock?

THE COURT: Sustained. This mathematical calculation and not evidence to be made by counsel.

MR. SHAW: I am sorry, your Honor.

MR. MANDEL: It is erroneous for another reason, your Honor, because it omits the equity.

THE COURT: Sustained.

Q I would like to quickly run forward to the year 1966. During the year 1966 were you long Westec stock?

A During the year,yes.

Q And as of the end of the year -- withdrawn.

As of August of 1966 were you and your wife long approximately 11,000 shares of Westec stock?

A No.

Q What was the figure, sir?

A [illegible],800 shares.

Q Had you purchased --

MR. SHAW: I am sorry, Mr. Mandel.

THE COURT: Do you have an objection?

MR. MANDEL: Yes, your Honor, I think inadvertent there is confusion.

THE COURT: If there is confusion --

MR. MANDEL: He means in different accounts.

MR. SHAW: All right, I will bring that out.

Q Did there come a time when trading was suspended in Westec stock?

A Yes, there did.

Q Prior to the time trading was suspended in Westec stock, did you have a telephone conversation with Mr. Jordon about that stock?

A Yes.

Q Where were you when you placed the telephone call or received the call?

A I wasin Wichita, Kansas.

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THE COURT: I will see what the state of the record is at that time, but the present state of the record and the issues in your complaint, which is what we are presently trying, I do not see that that is sufficiently relevant to allow it.

It may become relevant at some later stage or it may not.

MR. SHAW: Thank you, your Honor.

MR. MANDEL: May I have the written --

MR. SHAW: It hasn't come yet.

MR. MANDEL: The amendment?

MR. SHAW: They are not here yet either. They are coming up.

(In open court.)

THE CLERK: Mr. Buckley, you remain sworn.

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Buckley, do you have Exhibit B?

A No, I don't.

MR. SHAW: Where is the book, Exhibit B?

Q Mr. Buckley, I am placing before you Defendants' Exhibit B as well as Plaintiffs' Exhibits 9 through 21, and I would like to direct your attention again, if I may, to the year 1962.

Now, as of that point, Mr. Buckley, the year 1972, had you been out of college for a number of years?

A Up until that point did you say?

Q As of 1962 had you been out of college for a number of years?

A Yes, I had.

Q What college did you attend, sir?

A Cornell University.

Q Did you graduate?

A Yes, I did.

Q In what year did you graduate?

A 1952.

Q In what area did you specialize in college?

A Undergraduate I believe the major was economics.

Q Did you go --

THE COURT: Mr. Shaw, I think unless you have to deal with an exhibit, if you will stand back, the witness will speak up and the people in the back of the room will hear.

MR. MANDEL: Thank you.

THE COURT: Otherwise he is talking to you in a corner.

MR. SHAW: I am sorry, your Honor, I was about to.

Q Did you go to graduate school?

A Yes, I did.

Q What graduate school did you attend?

A Cornell University Business School.

Q Did you graduate from graduate school?

A Yes, I did.

Q With what degree, sir?

A In marketing, I believe. The precise title is International Marketing.

Q After your graduation what did you do, go with Lever Brothers?

A I was hired by Lever Brothers in July of 1953 as a marketing trainee.

Q In what year did you marry?

A Excuse me, 1958.

Q When did you first begin to buy and sell securities where Mr. Jordon was the customer's man or registered representative or member of the firm or whatever?

A In July of 1959.

Q Now, when your account at Gross & Company opened up, was that the year 1962?

A Yes, I believe it was April.

Q Can you recall -- it was in April of 1962, correct?

A I believe so.

Q Now, in the month of April of 1962 can you tell the Court what your long position was at the end of the month?

A May I use Exhibit B?

Q Whatever you would like to use, sir.

THE COURT: Mr. Shaw, can't you just point out what the record shows and then go on to the question you want to ask him based on that?

MR. SHAW: All right.

THE COURT: I take it you are not doing this to have him read from the record and you want to ask him a question about it, is that right?

MR. SHAW: All right.

Q What proportion --

THE COURT: Show him Exhibit B or whatever and I take it it is revealed there what his long position was according to that exhibit.

Q During April of 1962 did you purchase shares of Alberto Culver, 200 of them, correct?

A Yes.

Q Was that your initial purchase?

A Through Gross & Company and Newburger Loeb?

Q Yes.

A To the best of my knowledge and according to these records it is.

Q Upon whose recommendations were those shares purchased?

A Mr. Jordon's, to the best of my recollection.

Q Did you also during the month of April purchase shares of Curtis Mathes?

A Yes, I did.

Q 300 shares, correct?

A Yes.

Q And upon whose recommendation were those shares purchased?

A They were purchased upon my volition. I don't really recall whose recommendation.

Q As the result of those purchases during the month of April, did you owe Newburger, Loeb the sum of approximately $11,338.13?

A You said April. The day is May 9th on this register or on this statement.

Q As of May 9th?

A As of May 9th, yes.

Q Does this statement show various other transactions during the months of April and May of 1962?

A Yes.

Q Were any of those stocks purchased upon the recommendation of Mr. Jordon?

A No.

Q Which ones were not his recommendation?

A Additional purchases of Curtis, Mathes.

MR. MANDEL: Excuse me, please speak up, I cannot hear. I hate to be a nuisance.

THE WITNESS: No, my fault.

A Additional shares of Curtis Mathes.

Q How many additional shares?

A 300.

Q Now, during the month of June did you purchase additional shares of Electronics Capital, Padington Corporation, Certeed Products, Rockaur Brothers and Electronic Capital?

A Mr. Shaw, I am not being evasive, I believe the statement is for both June and July. You said June. Some of them were June and some of them were July. It is very difficult to read the register.

Q Doesn't this say June?

A I believe that is Jul. No, it is Jun, I'm sorry, excuse me.

Q Did you purchase those shares?

A Yes, I did.

Q Upon whose recommendation?

A Certain of them were Mr. Jordon's and certain other purchases were upon unknown recommendations, unrecollected recommendations.

MR. MANDEL: Excuse me, I am terribly sorry.

THE COURT: Mr. Mandel cannot hear.

THE WITNESS: It is simple, I am just forgetting. I am looking here and talking.

MR. MANDEL: May I have the last answer back, I just did not hear.

THE COURT: You may.,

(Record read.)

Q Now, as of June 20th, how much did you owe Newburger, Loeb, I am referring to 1962.

A $42,066.45.

Q Now, as of July 27, 1962, how much money did you owe Newburger, Loeb?

A $30,457.82.

Q During the month of July 1962 you purchased approximately $25,000 worth of additional shares, correct?

A No, that is not correct.

Q Well, your debit balance increased from $4,266 to $30,457, did it not?

A Yes, it did.

Q Did you purchase and sell shares so that your indebtedness to Newburger, Loeb was increased by approximately $25,000?

A Yes, I did.

Q Now, upon whose recommendation were those shares purchased?

A Do you wish me to go stock by stock?

Q Can you point to any one of these shares which was purchased by you as a result of your own decision rather than the recommendation of Mr. Jordon?

MR. MANDEL: I object to the form of the question.

MR. SHAW: I withdraw the question.

MR. MANDEL: One moment, please.

MR. SHAW: I withdraw it.

THE COURT: It is withdrawn.

Q During the month of July 1962 what share did you purchase, based upon your own recommendation to yourself?

A 200 shares of Rockaur Bros. 6 per cent convertible preferred.

Q Any other?

A Not to my recollection.

Q Now, during the month of July 1962, you also sold various shares, correct?

A Correct.

Q Upon whose recommendation were those shares sold?

MR. MANDEL: I object to the form of the question, your Honor. It assumes that all of the shares were sold according to one person's recommendation.

MR. SHAW: I will withdraw the question.

Q Will you tell us the circumstances whereunder during the month of July 1962 you sold the shares which you sold during that month?

A Well, Mr. Shaw, to the best of my recollection in July of 1962 the shares sold were the same shares that I recall Mr. Jordon having recommended purchasing so I assume the sales were due to the same recommendation.

Q That is your best recollection?

THE COURT: Strike out the answer.

MR. SHAW: May I continue, your Honor?

THE COURT: You may.

Q What is your best recollection as to the circumstances for the selling by you?

THE COURT: Just a minute, ladies and gentlemen, I, from time to time probably have and will again, strike testimony from the record. We are all human, we have heard what has been said so that it is a little bit of mental gymnastics to accomplish what is supposed to be done by striking something from the record, but what that means is that you are to put it entirely from your mind. You are to treat it as if it hadn't been mentioned and you are not to consider it in any way at any time in connection with deliberations or anything else. The testimony is stricken, it is as if it had never been spoken.

I know, as I say, that involves a little gymnastics of one kind or another, but it is what is expected of you to do and I am sure you will do it.

Go ahead.

MR. SHAW: May I have the question read?

THE COURT: Why don't you begin again. You had just begun one and I interrupted you.

Q Mr. Buckley, can you recall whether you had any conversation or conversations -- withdrawn.

Can you recall the circumstances under which you sold these shares during the month of July 1962?

A To the best of my recollection because of Mr. Jordon's recommendation.

Q During the period August 3, 1962 through August 20, 1962, did your indebtedness to Newburger, Loeb increase to a total of $51,107.87?

A Yes, it did.

Q During that month did you buy and sell certain securities?

A Yes, I did.

Q Can you tell us whether any of the securities bought or sold by you during that month were securities which you bought or sold as a result of your recommendation?

MR. MANDEL: He says, "your recommendation" and he says, "Mr. Dordon's recommendation," and he leaves out all the other sources of recommendation.

MR. SHAW: I will get to that in the next question, your Honor.

MR. MANDEL: It will be very hard for me on cross examination to get back to these particular transactions.

THE COURT: The question applies either to him or to Mr. Jordon. It doesn't seek anything as to anyone else so the answer is either yes or no.

MR. MANDEL: Your Honor, my point is this --

MR. SHAW: Your Honor, let me withdraw the question. I will make it absolutely foolproof.

I have withdrawn the question.

Q Will you tell the Court and the jury the circumstances under which you purchased and sold these shares reflected in this document during the period August 3, 1962 to August 20, 1962?

A To the best of my recollection upon Mr. Jordon's recommendations.

Q Now, during the period August 20, 1962 through August 31,1962, did your indebtedness to Newburger, Loeb increase?

A Yes, it did.

Q To what figure did your indebtedness increase?

A $12,509 minus 8 cents. $12,508.92.

Q What was the total indebtedness?

A $63,626.79.

Q Will you tell the Court and the jury the circumstances under which you purchased and sold these securities thereby increasing your indebtedness during this period, August 20, 1962 through August 31st?

MR. MANDEL: I object to the form of the question.

THE COURT: Overruled.

You may answer.

I Other than for one sale, the transactions were concluded to the best of my recollection by Mr. Jordon's recommendations.

THE COURT: Mr. Shaw, would you and Mr. Mandel come to the bench, please?

(At the bench.)

THE COURT: The new rules of evidence in the federal court permit that as you may be aware.

MR. MANDEL: They are not in effect yet.

I don't want to raise the technical point.

THE COURT: Mr. Shaw, why don't you see if you can grapple with the problem in some other way other than a recitation like this.

MR. MANDEL: I will go on the record this way. I am willing to let some evidence come in. I object very little. If this becomes laborous I am going to object to recommendation statements which are conclusions.

THE COURT: All right.

(In open court.)

THE COURT: I am going to rule that this particular manner of inquiry involving in some measure a reading from an exhibit that is already in evidence without the witness having any independent recollection of the facts, aside from what he reads, and going month by month in this fashion is somewhat cumulative given the overall totals that the witness has earlier testified and, Mr. Shaw, I am therefore making the suggestion to you that you pick specific months that you believe have some unusual quality about them and go forward on that basis, not on a monthly basis to the end of 1966.

MR. SHAW: Your Honor, I would like to do that as well as take a sampling if I may.

THE COURT: You may do that.

BY MR. SHAW:

Q Mr. Buckley, will you pick out certain of the ledger cards in the beginning -- I'm sorry, in the middle of the period 1962 through 1966?

A In the middle?

Q In the middle.

A In the middle. 1964, June.

Q What date?

A June 24, 1964.

Q As of June 24, 1964, can you recall the approximate amount which you owed Newburger, Loeb?

A Can I recall; no.

Q Does that document refresh your recollection with respect to approximately what you owed Newburger, Loeb at that date, June 24, 1964?

A Yes, it does.

Q What did you owe Newburger, Loeb?

A $296,384.70.

Q Now, during that month did you buy and sell securities?

A Yes, I did.

Q Did you, during that month, decrease your indebtedness?

A No, I didn't.

Q What was your indebtedness at the end of the month?

A $272,505.72.

Q Now, would you tell the Court and the jury the circumstances under which you purchased and sold securities during that month?

A Excuse me, Mr. Shaw, clarification? What do you mean by the circumstances?

Q What do you recall as to why you bought and sold securities that month?

MR.MANDEL: Excuse me, may we have it as to the specific securities?

THE COURT: Yes, by all means.

MR. MANDEL: Mr. Shaw, you have a list here.

Q During that month did you buy National Lead?

A Yes, I did.

Q Did you buy Data Control Systems?

A Yes, I did.

Q Did you sell Texas Gulf Sulfur?

A Yes.

Q Did you sell Vornado Corporation?

A Yes.

Q Can you recall the circumstances with respect to your sale of Texas Gulf Sulfur?

A To the best of my recollection Mr. Jordon's recommendation.

Q I ask you the same question with respect to the purchase of National Lead?

A I do not recall the purchase of National Lead.

Q I ask you the same question with respect to the sale of Vornado Corporation?

A Mr. Jordon's recommendation,to the best of my recollection.

Q I ask you the same question with respect to the purchase of Data Control Systems?

A Mr. Dordon's recommendation,to the best of my recollection.

MR. SHAW: Your Honor, could I have just one minute to pick up a document that has just been delivered. Excuse me.

(Pause.)

THE COURT: Mr. Shaw, we can deal with that at the recess.

Q Now, I ask you to pick ledger cards dealing with your accoun toward the end of the period?

A I don't mean to be picky, Mr. Shaw. We call these ledger cards. You mean these statements?

Q Yes, I mean these statements.

A Near the end of the period?

Q Yes.

A You say my account. I assume you are including or excluding Mrs. Buckley's.

Q Your account or your wife's account, it makes no difference.

A All right. I have chosen or I have opened to August 1965 through September 1965, Mrs. Buckley.

Q During that month did you increase -- withdrawn.

During that month what was the amount of your indebtedness to Newburger, Loeb?

A Mrs. Buckley's was $58,467.76.

Q Did you buy or sell securities with respect to your wife's account?

A Yes.

Q In other words, you were in contact with Mr. Jordon?

A Yes.

Q Was your wife ever in contact with Mr. Jordon, to your knowledge?

A Yes.

Q Was she in contact with Mr. Jordon frequently with respect to the purchase and sale of securities?

A As far as the purchase and sale of securities, I believe she was never in contact with Mr. Jordon.

Q During that month did you purchase securities in your wife's behalf?

A Yes.

Q Did you purchase shares of Savoy Industries, Western Equities, did you, sir?

A Yes.

Q What did you pay for those securities?

A About $19,000.

Q Can you recall the circumstances under which you purchased those securities?

A Upon Mr. Jordon's recommendation.

Q Western Equities, is that known by another name?

A It is known by two other names, Westec prior to Western Equities and Tech-Sym.

Q Mr. Buckley, during the period 1962 through 1966, did you have occasion to go to the office of Mr. Jordon?

A Yes.

Q Where was that office located?

A Someplace in the Wall Street area. I don't know the address.

Q Did you go there on more than one occasion?

A No.

Q Just once?

A Just once.

Q When was that, sir?

A At the end of August of perhaps early September 1966.

Q Did you go there during business hours?

A Yes, business hours being market opening or 9:00 to 5:00, or what?

Q 9:00 to 5:00.

A Yes.

Q Did you go there alone or with somebody else?

A I went there by myself.

Q Did you meet Mr. Jordon on that occasion?

A Yes.

Q Did Mr. Jordon have a desk in a room there?

A Yes, he did.

Q Was his desk in a private room or was the room a room in which various desks were located?

A The latter.

Q Various desks were located?

A Yes, sir.

Q Approximately how big was the room?

A Approximately about the size of this room, approximately.

Q Approximately how many desks were located in the room?

A Probably 40.

Q On this occasion can you recall meeting Mr. Gross?

A No, I cannot recall.

Q Can you recall seeing him there?

A No, I cannot recall.

Q Can you recall on this occasion meeting either Mrs. Bleich or Mrs. Donoghue?

I'm sorry, Miss Bleich or Mrs. Donoghue.

A I had testified before in my deposition that I vaguely remember Miss Bleich. I believe it was on this occasion. To the best of my recollection, I have never met Mrs. Donoghue.

Q Where was Miss Bleich, where was her desk located in relation to Mr. Jordon's?

A I do not know.

Q Can you recall whether for the first time you had any conversation with respect to Western Equities or Westec?

A Excuse me, Mr. Shaw, my mind was elsewhere.
Could I ask the question to be repeated?

Q Can you recall when for the first time you had any conversation with Mr. Jordon about Western Equities?

A I believe it was in 1964.

Q Thereafter did you have conversations with Mr. Jordon about Western Equities?

A Yes.

Q During what period of time?

A From the introduction, from that first date, through and probably past September 1966.

Q How frequently did you have such conversations?

A Frequently is a relative word. I would say several times a week.

Q Now, when for the first time did you buy stock of Western Equities -- let's use the word Westec from now on.

A Right.

Q When for the first time did you buy Westec stock?

A May I consult my records?

Q Certainly.

MR. SHAW: Your Honor, while Mr. Buckley is looking at the records, could Mr. Mandel and I approach the bench?

THE COURT: All right.

(At the bench.)

MR. SHAW: At this point, your Honor, I would like to hand up the amended complaint.

MR. MANDEL: I don't have it.

MR. SHAW: I would also like to hand up a memorandum of law on the admissibility of the questioning with respect to Westec.

THE COURT: These go to the sales that constitute churning and that is wholly admissible under the pleadings. I will look at this with regard to whether he goes any further.

MR. SHAW: I would like to apologize for the lateness of this. I was telephoned by Peter Sudler and I began writing this at 5:30 this morning.

(In open court.)

MR. SHAW: May I proceed, your Honor?

THE COURT: You may.

MR. SHAW: Could I have the last question read back, please?

(Record read.)

A July 6, 1964.

Q I'm sorry, could I have that date, please?

A July 6, 1964.

Q How many shares did you purchase initially.

A 600 shares.

Q Can you recall having a conversation with Mr. Jordon prior to the purchase of those shares?

A Yes.

Q Can you tell the Court and the jury what the conversation was to the best of your recollection?

A Not specifically, Mr. Shaw, no, I can't.

Q Not word for word, but just what your best recollection is, sir.

A That there was a stock on the American Stock Exchange called Western Equities. It was based in Texas; that it was involved in oil equipment and property leases and that he recommended I buy it. That is about the general gist of the conversation.

Q Thereafter did you have a further conversation with Mr. Jordon with respect to Westec?

A Yes, I have so testified.

Q When was your next conversation, sir?

A When, I can't recall.

Q Approximately?

A By July 22, 1964.

Q What was the conversation?

A The purchase of additional securities. To purchase additional equity in that company.

Q What did he say to you and what did you say to him,in substance?

A In substance he recommended I purchase additional Western Equities.

Q Thereafter did you purchase additional shares of Western Equities?

A That day.

Q How many shares did you purchase?

A 100 shares.

Q Now, thereafter did you have a further conversation with Mr. Jordon with respect to Western Equities, Westec?

A Yes.

Q When was that, sir?

A July 23, 1964.

Q What was the conversation?

A To buy additional shares of Western Equities.

Q What did you do?

A I bought additional shares of Western Equities.

Q How many shares?

A 500 shares. Excuse me, 600 shares, a second purchase on that date.

Q Thereafter did you have another conversation with Mr. Jordon about Westec?

A Yes, I did.

Q When was that?

A On July 24, 1964.

Q What was the conversation?

A To purchase additional shares of Western Equities.

Q Now, did you purchase those additional shares?

A Yes, I did.

Q Just to summarize, will you give us the dates when you purchased additional shares of Western and the amount of shares you purchased?

A The month of July or any period, or what?

Q Thereafter.

A Thereafter. I believe the first day was July 6th, I am going on recollection now from previous testimony.

July 22, 1964.

Q How many shares?

A 100 shares.

Q Would you continue?

A Pardon me?

Q Would you continue. Just give us the date and the amount.

A July 23, 1964, 600 shares.

July 24, 1964, 5,700 shares.

September 10, 1964, 1,000 shares.

February 5, 1965, 2,200 shares.

February 10, 1965, 6,000 shares.

March 5, 1965, 1,300 shares.

August 12, 1965, 2,900 shares.

August 13, 1965, 4,600 shares.

A clarification question, Mr. Shaw, do you wish my purchases through Merrill Lynch or not?

Q I will get into that.

A September 10, 1965 --

Q I'm sorry, just to avoid any confusion. Give us the Merrill Lynch purchase as well unless Mr. Mandel objects?

MR. MANDEL: No.

Q Go ahead.

A August 18, 1965 through Merrill Lynch, 900 shares.

August 19, 1965 through Merrill Lynch, 5,100 shares.

September 10, 1965 through Newburger, Loeb & Gross & Co., 100 shares.

May 6th -- excuse me. Did I understand you correctly before to include Westec and Tech-Sym?

Q They are the same corporation under different names.

A In my viewpoint they were. Technically I cannot comment. Legally I cannot comment.

Q A time came when the name was changed from Western Equities to Westec?

A Yes, it was in reorganization.

Q And a time came when it was changed from Westec to Tech-Sym?

A Yes.

Q Will you continue giving us your purchases of shares of stock of this corporation by whatever name it may have been known at any particular time?

A May 16, 1969, 2,500 shares.

June 17, 1969, 1,200 shares.

Q I'm sorry, I meant for you to stop at '65.

MR. MANDEL: Excuse me, I would like to have the last answer.

MR. SHAW: Could it be read back.

MR. MANDEL: May 16, 1969, 2,500 shares and June 17, 1969 --

(Record read.)

MR. MANDEL: Were those bought at Merrill Lynch?

MR. SHAW: Please, please.

Q Will you continue in answering the question?

THE COURT: You can ask that on cross examination.

A I am confused on the time limit of the question, was it through 1966?

Q Yes.

A That is the answer.

Q After 1966 were you dealing with Gross & Company?

A No, I was not.

Q During this period 1962 through 1966 did you sell Westec shares or Western Equities shares?

A Yes, I did, Mr. Shaw.

Q Will you tell us the dates?

A Yes, Mr. Shaw.

MR. SHAW: I withdraw the question.

Q Can you recall with respect to the transactions where you purchased Westec shares whether you had a conversation with Mr. Jordon prior to each one of these purchases?

A Yes, I did.

Q Can you recall what he told you and what you said to him in substance prior to each purchase?

A He would recommend --

MR. MANDEL: I object.

MR. SHAW: I am merely trying to shorten it, your Honor.

MR. MANDEL: We have something like 14 purchases and Mr. Shaw is asking for a summary of 14 purchases in one conversation.

MR. SHAW: I am merely trying to shorten it, your Honor.

MR. MANDEL: It seems to me what Mr. Shaw is trying to do is create fiction here.

MR. SHAW: I withdraw the question, your Honor, I will reask the question.

THE COURT: Go ahead.

MR. GRUTMAN: Your Honor, I object to such characterizations.

MR. SHAW: I ask that the jury be instructed that these comments should not be made on a ruling on evidence.

THE COURT: Put your next question, please.

Q Mr. Buckley, I ask you to look at your record and pick out a date in the middle of the purchases that you made of Westec shares. Give us the date in the middle.

A February 5, 1965.

Q All right. Can you recall whether you had a conversation on or before that date with Mr. Jordon of Gross & Company?

A Yes, I can.

Q What was the conversation, to the best of your recollection?

A That I purchase additional shares of Westec.

Q What did you say to him?

A Yes.

Q How many shares did you purchase?

A On February 5th I purchased 2,200 shares.

Q May I ask you to pick out a date towards the end of the time you were purchasing Westec shares?

A Through Gross & Company, Mr. Shaw?

Q Yes.

A August 19, 1965.

Sorry, excuse me. August 13, 1965.

Q Was that one of your last purchases through Gross & Company of Westec shares?

A It was one of the last, yes.

Q Did you have a conversation with Mr. Jordon?

A Yes.

Q What was the conversation?

A Buy additional shares of Western Equities.

Q What did you do?

A I bought additional shares of Western Equities.

Q Now, did you, during this period, have any conversation with Mr. Jordon of Gross & Company with respect to the corporation Westec or Western Equities or any information about the corporation?

A To the best of my recollection, yes.

Q When for the first time did you have that conversation about Western Equities, the corporation?

A July 6, 1964.

Q Did there come a time when you and Mr. Jordon discussed the financial affairs of the corporation?

A Yes.

Q When was that discussed for the first time?

A In the spring of 1965 upon the release of the annual report.

Q You said upon the release of the annual report?

A Yes, I did.

Q Was this conversation in person or over the telephone?

A I don't recollect, but I rarely talked to him in person.

Q What was the conversation?

A I don't recall --

Q Just the substance of the conversation. You can't be expected to recall each word. I am sure we would all agree with that. Just the substance, your best recollection.

A I don't recall the substance of the conversation.

Q It had something to do with the annual report, correct?

THE COURT: No, I am going to sustain an objection to the leading.

Any recollection of that conversation?

THE WITNESS: Do I speak to you?

THE COURT: No, I am putting a question to you, Mr. Buckley.

THE WITNESS: Yes, I recollect speaking to Mr. Jordon upon receipt of the annual report, yes.

THE COURT: What did you say and what did he say,if you have any recollection?

THE WITNESS: I don't have any recollection.

Q Do you recall what you said upon receipt of the annual report of Westec?

A Do I recall? No, I do not recall.

THE COURT: Ladies and gentlemen, we will take our mid-morning recess at this time.

(Jury left courtroom.)

THE COURT: Mr. Shaw and counsel, let me say I have read this proposed amended complaint. I don't see any facts alleged here which make it fair to allow this. This doesn't say anything any more than these acts -- it doesn't say what section of the agreement, in what way it breaches the agreement, what provision was violated. I think you have got to do better than that before I am going to permit this. When you ask for damages higher than were alleged in the complaint itself. The complaint asked for 249 plus 50,000 counsel fees. This asks for 310 plus unspecified counsel fees.

What is the paragraph of the agreement that is alleged to be breached and in what way is it alleged to be breached?

MR. SHAW: I think you will find, your Honor, that I am relying on paragraph 7 and 10 of the agreement.

THE COURT: So that Mr. Mandel is on some kind of a notice, we will treat this as an allegation that it was in violation of paragraphs 7 and 10 of the agreement.

MR. SHAW: Which I have read in, your Honor.

THE COURT: In what way are the acts that you propose to prove violative of 7 and 10 of the agreement?

MR. SHAW: I also rely upon paragraph 8 of the agreement.

THE COURT: &, 8 and 10.

In what way are they violative of 7, 8 and 10?

MR. SHAW: I have attempted to set this forth in my memorandum, your Honor, and in substance I submit that this is a situation where there was no inquiry with respect to the ability of this customer to pay for securities; that the securities were way beyond his financial depth; that the investments that he was engaged in were totally unsuitable to him.

I submit that the account was churned.

I also submit and I do this in a manner which is not taken lightly by me, that the purchases of these shares were also a part of a fraudulent manipulation and course of conduct with respect to Westec.

MR. MANDEL: It is a brand new case.

MR. SHAW: This is something that is coming out, your Honor, right now in the course of this case.

THE COURT: I am going to allow this in any complaint assuming that paragraph 4 reads that this constitutes violation of paragraphs 7, 8 and 10 of the agreement.

I will strike paragraph 5 from the amended complaint in that the allegations differ from those previously alleged and otherwise I will permit it to stand.

MR. MANDEL: May I be heard for a moment on this, your Honor, because I would like to make sure that the ruling is clear.

Is your Honor ruling that churing may be violative of this?

THE COURT: I am merely ruling, Mr. Mandel, that the present -- that the allegations that exist between numbers 1 and 28 of the complaint filed back in 1971 are now asserted as a violation of paragraphs 7, 8 and 10 of the clearing agreement and nothing more.

MR. MANDEL: I understand.

MR. SHAW: May I make a statement?

THE COURT: With the same damages.

MR.SHAW: It would seem to me as an abstract proposition that if this were merely a churning claim in this courtroom and if in the course of the churning claim, particularly in view of the volume of records in this case and its complexity, particularly in view of the fact that counsel has come into this case, although it has been pending since 1971, less than one year ago, if in the course of the trial facts come up which show that in addition to churning there may have been actual fraudulent misrepresentations and concealment, it would seem to me that it is my obligation to attempt to adduce those facts and an obligation upon the part of this Court to inquire as well as to whether the securities laws have been violated.

Let me be more specific,if I may, so that

Mr. Mandel may be placed on notice, although I am not saying this is a substitute for a good pleading.

The facts are all in the depositions, your Honor, to the effect that Mr. Jordon advised Mr. Buckley not to sell, advised Mr. Buckley not to sell because rumors that were circulating --

THE COURT: Mr. Shaw, if you say to me that the facts were in the depositions and I take it the depositions were completed some time ago, then there is no foundation whatsoever for an argument that you are going to use this trial as an exploration and at a later point say, now I want to charge fraud.

Clearly you are barred from doing that. You were on notice of these facts at the conclusion of the depositions and if there was any desire to assert them, they should have been asserted at that time by a promotion to amend the pleadings.

I don't want to hear anything further on this subject at this time.

Now, Mr. Grutman.

MR. GRUTMAN: Yes, your Honor.

THE COURT: Just so you have some idea where we are at. I am going to rule as a matter of law two things:

One, that Judge Ward's determination as to the legal effect of Section T98 is the law of the case.

I am further going to rule that having reviewed Section T98 myself that I reach the same conclusion and I am going to so charge the jury at the close of the case.

Section T98 is an absolute proscription against acting without the limited partners' consent.

I read the authorities that you submitted to me yesterday. I had them researched and I don't agree that they open the issue wide. I don't agree that they allow a finding to the contrary.

Now, I am troubled by what I see in front of us due to some rumor that has reached my ear from some source that it is intended to call an expert witness on the subject of whether Robert Persky was in good faith in giving the opinion that he gave.

MR. GRUTMAN: Where has that rumor originated?

THE COURT: If the rumor is in error, it came to me through one of my law clerks. If that is in error, so be it. It would seem to me if you were to call an expert witness on the subject of the legal -- of whether Robert Persky was in good faith in -- it seems to me that is a subject that is an issue here and on which proof should be allowable. Certainly Mr. Persky should be

MR. GRUTMAN: I wish to be heard.

THE COURT: Me. Mandel.

MR. MANDEL: Excuse me.

MR. GRUTMAN: Your Honor, I will say candidly, your Honor, that until the research was done on Rule 54, which was submitted to the Court in the memorandum that we handed up yesterday, I had the same view that your Honor has announced as his view, but having read the cases --

THE COURT: I completely agree with you and I had that situation when I was in practice that a motion for summary judgment is not binding upon the trial court. I don't disagree with you on that, but the normal summary judgment situation involves a rather complicated factual situation or one that has some flexibility about it and the trial court is in a position to and should review the record before it.

The problem with your position is that the record that Judge Ward had had to do with the absence of two signatures. That record is not going to be changed in this court.

MR. SHAW: Mr. Mandel hopes, your Honor.

MR. GRUTMAN: Except, your Honor, the rule as we understand it and as we have explicated the law according

THE COURT: I have considered that. We will take our recess.

MR. SHAW: Thank you, your Honor.

(Recess.)

(In open court, jury present.)

BY MR. SHAW:

THE COURT: Why don't you start, if there is any concern on their part, we can have the transcript read to them on an appropriate occasion.

MR. SHAW: Thank you, your Honor.

Q Mr. Buckley, during the recess did I speak with you?

A No.

Q Of course not.

THE COURT: We just started, Mr. Grutman.

MR. GRUTMAN: Thank you, your Honor. I think it is called point of personal privilege.

THE COURT: I had made preparations for the transcript to be read to you if you were not satisfied with my statement.

MR. GRUTMAN: I am sure I would have been. Thank you, Judge.

Q I would like to return to the subject of the conversations that you had with Mr. Jordon during this period, particularly the years 1964, '65 and '66 about Westec other than the conversations with respect to the actual purchase and sale of the stock.

I believe a time came, I am asking you this question just to fix the period of time in your mind, when you attended a certain breakfast meeting at the Plaza Hotel. Did you do that, sir?

A Yes.

Q At that breakfast meeting was Mr. Jordon present?

A Yes, he was.

Q Was there a Mr. Hall present?

A Yes, there was.

Q How as Mr. Hall employed at that time?

A He was president of Western Equities.

Q Can you recall what part of the year and what year that was when you attended that breakfast?

A It was the late spring or early summer of 1966.

Q Prior to that breakfast meeting had you had any conversations with Mr. Jordon about Westec?

A Yes.

Q Approximately how much prior, weeks or months or years or days? What is the period of time prior that you had conversations about Westec with Mr. Jordon?

A Any conversations?

Q No, specific conversations about the affairs of the corporation.

A Several. You say how many. Several times a week about the affairs of the corporation or the activity on the American Stock Exchange.

Q Beginning in 1966 did you have any conversations with Mr. Jordan about Westec?

A Yes.

Q Can you recall what the conversations were?

MR. MANDEL: Excuse me, which conversation? May we have a specific conversation?

MR. SHAW: That is my problem, your Honor. It is in the early part of 1966. I can only get into it that way.

Mr. Mandel knows what I am leading to and I am trying not to lead.

MR. MANDEL: If it is what I think he is leading to, your Honor has already ruled.

MR. SHAW: I don't believe that is a subject of a ruling. Conversations about Westec are admissible I understand.

THE COURT: This does not invade the ruling at the beginning of the morning with regard to the questions that were proposed at the close of yesterday's session, I take it?

MR. SHAW: It doesn't relate to Wichita, if that is what you mean.

THE COURT: Very good.

MR. SHAW: I hope to have an opportunity to discuss that.

THE COURT: Go ahead.

A Yes.

Q Will you tell the Court and jury what the conversation was, sir?

A Yes, there were several conversations during early 1966, the time Mr. Shaw has questioned, Westec was relatively active. When I say relatively active, it was one of the top five or ten most active stock on the American Stock Exchange every day they are listed on the page of the papers.

I was very concerned both positively and negatively because when a stock is very active over a period of time it is my fairly amateurish feeling that something is going on.

My question is what is going on?

As I recall, the stock was very active continually. It was not a one day or once a week. Even so my question to Mr. Jordon was, what is going on.

His typical answer was he really didn't know specifics but people were obviously buying and selling to account for the activity.

That was one subject.

A second subject and a very important subject to me, shortly after the close of a company's fiscal year, which in Westec's case was December 31st, they issue an annual report. These are done by the large corporations, the listed corporations, sometimes six, eight to ten weeks after the close of the fiscal year, so the accountants can add up the books and tell you whether the company made or lost money. This was not done for Westec for some period of time and that was a serious question in my mind, at least for myself, whom I can only speak for, when you don't have information, you have questions.

The market also does not like uncertainty. The market likes facts. There was no certainty about Westec during this period of time as to its financial status as of the end of 1965.

This not only went on for several weeks, it went on for months. Mr. Shaw asked about early '66, I guess I can relate that to the first six months of '66. It was not until sometime in May of 1966 which to my way of thinking was an unduly long period of time that a report was finally issued.

The answer that I recall getting from Mr. Jordon was that Westec was a relatively diversified company, as I commented before it was in more than one field and it literally took time for the accountants to assess the profit and loss position, the balance sheet position of the various subsidiaries, but the report was finally released in my recollection in May of 1966 for the year 1965.

Again this compared to annual report release dates of listed companies that rarely go much past March, sometimes in April perhaps if there is an unusual instance, but basically in the first quarter of a calendar year.

So that was the second subject, the activity in the stock being the first subject, that being the second.

The third was strictly a matter of pecuniary greed, as I recall the stock was doing very well so one talks about things positively when stocks are doing well, so I talked about that, too. Those were the three major subjects discussed.

Q What did you say as to the price of the stock?

A It looks good.

Q Did you have any further conversation about the price of the stock; anything about ratios?

A Are you talking early '66 still, Mr. Shaw, the first six months, or what?

Q Yes, early '66.

A Early?

Q Or during the first six months of '66.

A During the first six months of '66 I was very concerned about what is called price earnings ratios. These are, if a stock makes $3 million -- if a company makes say $3 million a year and there are 3 million shares outstanding, one says they make a dollar per share and I don't really recall Westec's price earnings ratio, but once the annual report came out from which source this data could be accumulated, I had questions about the price of the stock in relation to the earnings that had just been reported.

Q What did you say and what did he say?

A I don't recall Mr. Jordon's initial reaction but I was sufficiently concerned that I talked to people other than Mr. Jordon.

Q Did you discuss it with Mr. Jordon?

A Yes, I did.

Q What did he say?

A I said I don't recall, Mr. Shaw, specifically.

MR. SHAW: I'm sorry.

Q Now, can you recall having a conversation with Mr. Jordon after you went to the breakfast or before the breakfast or during the breakfast at the Plaza Hotel during April or the summer of 1966?

A You asked several things, let me answer them severally.

Q At that point of the breakfast did you have any conversation with Mr. Jordon that you can recall?

A Yes.

Q What was the conversation?

A Before the breakfast he invited me to the breakfast to meet Mr. Hall, the president of Westec and other company officials or official, I don't really recall who was there other than Mr. Hall, the president, and one other person. There may have been other people that I definitely recall, too. He invited me to the breakfast, that was before.

During, I don't really recall us talking directly because the breakfast was for Mr. Hall to address interested people. I don't really recall specific questions and answers that went on.

Q Did you have any conversation with Mr. Jordon on this occasion?

A Yes, I'm sorry, I was referring to direct conversations with Mr. Jordon at the breakfast. I don't recall specific items of conversation with Mr. Jordon other than the fact that Mr. Hall being there and he would like me to have met him, which I did and there were several other people involved, other interested parties, I presume. I say interested parties, people like myself, and I believe an analyst or two.

The subject of -- Mr. Hall brought up the subject of a possible merger that might be proposed, that might be forthcoming or be consummated, I don't recall which one, forthcoming or consummated that day or in that immediate period of time. I don't recall speaking with Mr. Jordon specifically about the merger. It was not my reason for being there.

My reason basically was to meet Mr. Hall. He was the president of a company in which I had considerable investment.

Q What was your investment at that point based upon, market value?

A Between two brokerage houses.

Q Yes.

A 14,300 shares. I don't recall the specific price during that period of time. If we take an average of $50 or $55 a share, it was around $700,000.

Q On margin, correct?

A On margin with Newburger, Loeb and Gross & Company, and I believe on margin also with Merrill Lynch, although I can't comment specifically.

Q How much did you owe on margin?

A I would have to look it up.

MR. MANDEL: I object. I wonder whether he is being asked how much he owed on this stock or on all stocks.

Q What was the amount of your margin indebtedness to Newburger, Loeb as of the summer of 1966 and by that I mean you and your wife?

A When you say summer, do you mean any month in the summer or what?

Q Yes, any month during the summer.

A On August 26, 1966, Mrs. Buckley's margin balance was $145,951.82.

There was no margin balance -- no debit balance in our joint account as of June of 1966.

In my account, as of the summer, I can't read the date, I can see the '66, I believe it is August, there was a debit balance of $152,277.57.

Q So between you and your wife you owed Newburger, Loeb approximately $300,000 during August of 1966, is that true?

A Those are the numbers I just read and if I could suggest we refer back to the statement on December 15th, the sum was 289, so if that number you read was 300 odd, it decreased a little bit probably by the forced sale of the securities after Westec closed down.

Q Now, at this breakfast meeting or after the breakfast meeting, did you have any conversation whatsoever with Mr. Jordon in which he advised you to sell out?

A Sell out what, Westec?

Q Westec.

[illegible] Absolutely not.

Q You are quite sure of that, sir?

A I could qualify and say to the best of my recollection, but it is considerably more to the absolutely not than to the best of my recollection.

Q Now, after the breakfast meeting, when was the next occasion when you spoke with Mr. Jordon with respect to Westec?

A I can't specify, there is no specificity to the next occasion, but I spoke frequently about it because I was quite upset about it.

Q What did you say to him and what did he say to you?

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A We may have said many things. The specific instance that I recall --

Q Before that, I know what you are getting to, but before that did you have conversations with Mr. Jordon?

A I don't know what the before that is.

Q Before Wichita.

A This is before Wichita?

Q Right.

A I spoke to him about a comment, it was more than an idle comment, it was an analysis of the reference 1965 Westec annual report and the status of the balance sheet and the status of its earnings statement as the annual report revealed it to another analyst.

Q What did you say to Mr. Jordon and what did he say to you in substance?

A I repeated to Mr. Jordon this man's comments as well as I could recall them.

Q What did Mr. Jordon say?

A He said to the effect of everyone is entitled to their own opinion.

Q Did you and he discuss whether the stock should be sold?

A Yes.

Q What did he say?

A We are now into the summer, is that what you are talking about?

Q Yes.

A He said, don't sell the stock.

Q Was that the first time he told you, don't sell the stock?

A As already testified, I had sold the stock in earlier periods.

Q When you were trading, correct?

A I don't know your definition of traded. If you mean in and out, no. My definition of what I was doing was not in and out trading. That is my definition.

Q Were there more than one conversations that you had with Mr. Jordon prior to the conversation in relation to Wichita about whether the stock should be sold or not. By "sold" I mean getting rid of it.

A Discussions as to whether or not it should be sold, yes.

Q What did he say?

A He recommended against it.

Q In other words, hold the stock?

A Yes.

Q Yes?

A Yes.

MR. SHAW: Just one further point. Under the clearing agreement there is a provision with respect to rules and regulations of the New York Stock Exchange and there is a rule, a specific rule providing that where a customer gives instructions to sell and wants to sell, the stock should be sold.

THE COURT: But that isn't the claim here. The claim here is that too many stocks were sold.

MR. SHAW: There is also a claim for damages by virtue of breach of the clearing agreement.

MR. MANDEL: The breach of the clearing agreement is limited to churning.

THE COURT: Insofar as churning is a violation of the clearing agreement.

Let's go forward.

MR. SHAW: I respectfully object.

(In open court.)

BY MR. SHAW:

Q Mr. Buckley, I would like you to exclude the next conversation you had with Mr. Jordon.

A Mr. Shaw, to exclude, did you say?

Q Exclude, jump it.

When after that was the next time you spoke with Mr. Jordon?

A Would you please read the question.

(Question read.)

A I don't understand the question.

Q All right, let me do this:

Did there come a time when you had a conversation with Mr. Jordon with respect to certain actions that were taken by the American Stock Exchange during the summer of 1966?

A Yes.

Q When approximately was that, sir?

A Upon the suspension of trading in Westec by the American Stock Exchange.

Q Did you speak with Mr. Jordon?

A Yes.

Q What was the conversation?

A What is going on?

Q What did he say?

A He said that they had suspended trading in Westec.

Q Yes, what was your reaction to that?

A My reaction was --

THE COURT: No, sustained.

Q What did you say after --

THE COURT: No. Gentlemen, come up here.

(At the bench.)

THE COURT: I am concerned that this witness now is going to get into, according to him, to say, you dope, I told you to sell me out,which obviously gets into -- do you know what this conversation is?

MR. SHAW: I don't think he is going to say that.

THE COURT: I am troubled by the possibility that we might get into this area through the back door where I have excluded it from the front.

Frankly, what has this conversation got to do with churning?

MR. SHAW: The effort to get him to pay.

MR. MANDEL: There is nothing wrong with that.

THE COURT: Ask him about that particular subject matter without saying what you say.

MR. SHAW: All right.

(In open court.)

BY MR. SHAW:

Q Thereafter, were you contacted by Mr. Jordon with respect to any debit balance in your account?

A Thereafter,meaning the date of the closedown?

Q Yes.

A Yes, I was.

Q Did you have a conversation with Mr. Jordon?

THE COURT: On that subject.

Q On that subject?

A On that subject, yes.

Q What did he say to you and what did you say to him?

A He said, "What are you going to do about your debit balance, I am being pressed."

Q Go on, anything further?

A What did he say?

Q Yes.

A I said, "I am unable to do anything further about them."

Q Was there any further conversation?

A The gist being what are we going to do about it. I said I am unable to do anything about it other than sell other securities that I recollect were in the account.

Q Was that done?

A Yes.

Q As a result was there a deficit in your account?

A Yes, there was.

Q Was that deficit approximately $380,000?

A No, the deficit as of December 15th was 289, but that, I believe, included interest charges for the months of November, October and September, so the deficit as of the end of August 1966 was probably more in the nature of $250,000.

Q And interest kept on running each month, correct?

A Unfortunately, yes.

Q Was it pursuant to your agreement with Newburger, Loeb which you agreed to an interest rate?

A I recollect no agreement with Newburger, Loeb or Gross as to an interest rate.

Q As of March 26, 1970 there has been testimony that the deficit in your account and in your wife's account was approximately $380,000. Is that a correct figure including interest?

A Your question is is it a correct figure. I would have to sit down and estimate 289 plus interest to that point in time. It seems reasonable on the face of it.

Q Does the exhibit which has been placed on the blackboard indicate your assets and liabilities as of December 19, 1966?

A Yes, it does.

Q When you commenced trading with Mr. Jordon, did you have any conversation with him with respect to your investment objectives?

MR.MANDEL: May we have the date now?

MR. SHAW: 1962.

MR. MANDEL: No.

MR. SHAW: When the account was objected.

MR. MANDEL: One moment, please.

THE COURT: Sustained.

Q When did you commence trading through Mr. Jordon?

A I don't mean to quibble, but I don't know that I understand your definition of trading.

Q Buying and selling stocks, doing business?

A Buying and selling of stocks was in July of 1959.

Q At that point did you have any conversation with Mr. Jordon with respect to your investment objectives?

A Not at all, to my recollection.

Q At any point did you have any conversation with Mr. Jordon with respect to your investment objectives?

A Not at all, to my recollection.

Q Did you have any conversation with Mr. Jordon in which he inquired of you as to how much your salary was, what your assets were, what your liabilities were?

A I don't recall. My answer probably would have been the same as it was yesterday when I was asked the same question.

Q In other words, what you told us yesterday about your income?

A No. What I told you yesterday about my income, no, I didn't mean that portion of it.

Q I'm sorry.

A No, I did not mean that portion of the question. The portion I meant was,in effect,it is none of your business.

Q I see.

A If he had asked. You asked me if he had asked and my answer was, I don't recall him asking, but if he had, the answer would have --

Q You wouldn't have told him?

THE COURT: Go ahead, the answer would have been.

A The answer would have been similar to that part of the answer yesterday when I testified to the effect that I didn't particularly feel it was any of your business. In this case the Judge asked me to answer.

THE COURT: Mr. Buckley, just so we are clear in an answer that is all chopped up. You are saying if Mr. Jordon had asked you about your income, you would have told him it was none of his business?

THE WITNESS: That is right.

Q During this period of time, 1962 through 1966, did you owe $257,000 to Scarsdale National Bank?

A During this period 1962 through August of 1966 I don't remember. As of December 15th I did.

Q Did you owe that money to the bank in 1962?

A I would have to go through my loan records for that. I don't believe it was that large, but I don't know.

Q Do you know the reason why -- withdrawn.

Can you recall the reason why you borrowed that sum of money from the Scarsdale National Bank?

A Very definitely.

Q What was the reason?

A There were two reasons. One was the down payment for the purchase of the house and the second was ordinary living expenses.

Q So that represents a sum of money borrowed over a period of time, is that correct?

A That is correct.

Q Was any of that money used to finance your purchases of stock through Gross & Company?

A No, it was not.

Q Does that schedule on the blackboard set forth the total sums that you lost each year with respect to the purchase and sale of stocks through Gross & Company?

MR. MANDEL: I object to the form of the

question. It shows losses and gains.

THE COURT: Read it back.

(Record read.)

THE COURT: Sustained as to form.

Q During the year 1962 did you make or lose money by virtue of your purchase and sale of stocks through Gross & Company?

A I lost money. I lost money.

Q How much did you lose?

A $11,936.

Q If I ask you the same question with respect to the year 1963?

A I made money, $24,973.

Q If I ask you the same question with respect to the year 1964?

A $82,915 loss.

Q If I ask you the same question with respect to the year 1965?

A $2,401 profit.

Q And I ask you the same question with respect to the year 1966?

A $106,572 or $3 loss.

Q What was -- was there a net profit or a net loss?

A For the five years?

Q Yes.

A There was a net loss of $174,049.

Q Mr. Buckley, during this period of time did it ever occur to you to change brokers from Gross & Company?

A No.

Q Why not?

A I trusted the man.

Q At any time were you advised by Mr. Jordon that he individually owned Westec stock in his own or his family's name?

A Was I advised?

Q Yes.

A No, I was not.

Q At any time were you advised by Mr. Jordon that he individually was shorting the stock?

A No, I was not.

MR. MANDEL: I object to that.

THE COURT: Sustained. Strike out the last two answers. This has no relevance to this issue.

MR. SHAW: Respectfully object.

MR. GRUTMAN: May I be heard on that?

THE COURT: Do you want to be heard at the side bar?

MR. GRUTMAN: Yes, sir.

THE COURT: All right.

(At the side bar.)

MR. GRUTMAN: Your Honor, I respectfully submit that the questions which Mr. Shaw has asked are proper within the ambit of your present ruling. If your Honor is listening to evidence on a churning claim which goes to excessive buys and sells and if the volume of buying and selling in the account of this man, Mr. Buckley, who had 11,000 shares can be related to shares held beneficially by Mr. Jordon or for other customers, we have a motive for where there is buying and selling in the account. That is very relevant evidence as to why, for example, he made selling Buckley or buying shares for himself.

This is a ready source to make up his short position.

MR. SHAW: May I make a statement further, your Honor.

It seems to me there is a further aspect here that is relevant because churning is in essence a breach of the fiduciary obligation or the obligation between the broker and the customer.

THE COURT: All right, you have said enough.

MR. MANDEL: Come back, please. Let's get something on the record. I think I should be heard.

I think counsel are imposing on the Court.

MR. GRUTMAN: Please don't do that.

MR. SHAW: Not so loud.

MR. MANDEL: I think we should have on the record whether counsel have any evidence or reason to believe that at any time Jordon shorted any Westec stock.

MR. SHAW: I so represent.

MR. GRUTMAN: Absolutely, I so represent and state it will be proven authoritatively beyond any question.

MR. SHAW: I so represent.

(In open court.)

THE COURT: I reverse my last ruling. I am going to permit that answer to stand.

Read the question and the answer and we will get an answer to the last question.

(Record read.)

THE COURT: Go ahead. Next question.

Q Did Mr. Jordon ever recommend to you that you take a short position with respect to Westec stock?

A No.

Q Would you explain to the jury and the Court and me what a short position is?

A I will give the jury and the Court my understanding of a short position but please realize it is not my business and it may not be accurate.

When someone borrows stock from another customer through their respective brokerage houses that one does not own and sells the stock, that is my understanding of what a short position is.

There is another way to do it which might have had tax implications for my account that never came up through Mr. Jordon and that is called shorting against the box. That means that when you own the stock yourself, in this case I owned 14,800 shares at one period of time, and I had a considerable long term capital gain in that stock, that I might not have wanted to pay that year, I could have sold the stock against the box.

The difference being that in that case I owned the stock actually, not that I had borrowed stock that I did not own, such that I could have sold it at what they call short against the box and I would not have realized an immediate capital gain.

I could have postponed it because the stock that I had owned technically was not sold, as I understand it. It was sold short against the box such that you can postpone it until you then buy the stock back and cover your short position. So that there are capital gains reasons for doing it slightly differently, but the typical answer to Mr. Shaw's question was the initial part of selling stock that you do not own.

Q Do you make money if the stock goes up?

A Pardon me?

Q If you sell short do you make money if the stock goes up?

A And stays up, no.

Q Of course not. When you sell short you make money if the stock goes down, correct?

A If you have bought it back and covered your position, yes, but if you just sit there, no.

Q Now, did you ever have any conversation with Mr. Jordon about your father or your mother or Georgia-Pacific?

A Yes, I did.

Q Can you recall in substance what you advised Mr. Jordon about this?

A Yes. I can definitely recall telling Mr. Jordon that from time to time I would be forwarding stock of Georgia-Pacific in my name to him to add to my account. I may have so I won't say it.

That was one instance.

The second instance was, I definitely liked the company. I didn't like to sell the stock for emotional reasons, but I did sell it from time to time, but those decisions were mine. That is point two.

Point three. There was a testimonial dinner for the president and the chairman of the board of Georgia-Pacific held, I believe, by the New York Security Analysts at exorbitantly high prices and I bought three inviting Mr. Jordon as one of my guests for the evening. Those are the three specific instances that I do recall discussing Georgia-Pacific talk with Mr. Jordon.

Q Was your father employed by Georgia-Pacific?

A Yes.

Q Is your father alive?

A Yes, he is.

Q In what capacity was your father employed by the company?

A His final position?

Q Yes.

A Member of the board of directors and senior vice-president.

Q How long had he been with Georgia-Pacific?

A I thought you might ask that so I have thought about it. I believe since 1944.

Q Did he found Georgia-Pacific?

A No.

Q Now, during this period and specifically during the years 1964 and 1965, would you give the Court and the jury a description of your day-to-day business activities?

A Yes, I would be very happy to.

During 1964 and 1965 my title, I worked for Lever Bros. company and, as you know, that is what they call a consumer goods package company. It produces and sells products to the consumer, to you and to me.

These products are in the detergent field, in the cosmetics field, the toiletries field and the foods field.

The company is organized according to what is called product management lines. It is a term that has been associated with Procter & Gamble and Colgate and many of the large companies that I am sure you have heard about.

The function of the product management is to act as the business center or as more than coordinator because there is decision-making involved, but it is basically the management of his particular product.

Typically a product manager is assigned one product. I was what they call a product manager. There were about 25 product managers at Lever Bros. Company. My product upon promotion to that in 1960 and I believe through some of 1964, Mr. Shaw, was on Lux soap, Lux toilet soap.

It was about a $20 million a year business. I was responsible for the proper profits. The activity started with research and development on the product formula, manufacture of the product, sales of the product, resultant distribution of the product that was sold to the grocery industry, consumer advertising to the consumer about the product, nine out of ten Hollywood starts you probably heard about, that was the function. Working with the advertising agency on the account, in this instance J. Walter Thompson, here in New York.

Supervising the accounting for the product, meaning the profit and loss position of the product for the company's fiscal year, preparation of plans to the management of the company as to what you intended to do for that product the following year and in our instance for the following five years and then responsibility after the year was up and after a particular five-year period was up as to your stewardship.

Did you succeed or did you not succeed in your one-year plan and your five-year plan.

In the 1964 and '65 that Mr. Shaw referenced I believe I did that for additional products, but as I recall also toilet soaps like Lux soap.

Q Can you give the Court and jury how many hours a day you worked at your job?

A Worked at? Lever Bros. was open from 9:00 to 5:00. My day consisted of about 5:30 in the morning until well after 10:00 o'clock at night on company business.

Q Every day?

A Every day.

Q Weekends?

A Weekends, yes, sir.

Q For how long?

A Well, a misleading question. I was hospitalized for part of this period of time so it was not.

Q Relating to an operation?

A Yes, several.

Q Did you ever advise Mr. Jordon or anybody at Gross & Company that you were independently wealthy and a member of a privileged class or any leisure group or anything to that effect?

A I didn't hear the latter phrase.

Q Privileged class, did you ever use that word with him?

A No.

MR. SHAW: No further questions.

THE COURT: Ladies and gentlemen, we will take our luncheon recess and resume at five minutes of 2:00.

(Luncheon recess.)

eorf 90

AFTERNOON SESSION

1:55 p.m.

(In open court, jury present.)

DAVID W. BUCKLEY, resumed the stand and testified further as follows:

MR. SHAW: Judge, could Mr. Mandel and I approach the bench?

(At the bench.)

MR. SHAW: Your Honor, in view of your Honor's ruling on the Wichita conversation, I wonder if I could merely have it indicated on the record in some way that this is another conversation, we will strike all the words, but that it was Jordon's position in the course of this conversation again that he should not sell his stock?

THE COURT: I am not sure I follow you.

MR. SHAW: We have had a series of conversations prior to the Wichita conversation. I would just like the record to indicate that in that conversation he again said, do not sell the stock. I can ask him the question to extricate everything else.

THE COURT: No, I won't go into that conversation.

A Mr. Mandel.

Q To start off with, I think we can make things clear. You are not a plaintiff or a defendant in this case, are you, Mr. Buckley?

A No, I am not.

Q Mr. Jordon, you never sued Mr. Jordon in your life, did you?

A That is correct.

Q I would like to read to you a few paragraphs from the complaint in this case having to do with the changes and ask you whetehr they are true or false.

MR. SHAW: Objection, your Honor. That is the ultimate issue in this case.

THE COURT: I will sustain an objection to that question on the grounds of form. I think this is an inappropriate way to ascertain such facts as your question may elicit.

Q Is this statement --

THE COURT: No, I sustain.

MR. SHAW: It is an indirect way of doing the same thing, your Honor.

THE COURT: I sustain an objection to that as to form.

Q Did Charles Gross ever recommend a single trade to you of any kind?

A Mr. Mandel, not to be devious, but when you say trade, do you mean a buy or sell or a buy and sell.

Q Any transaction?

A Not to my recollection.

Q Did Mabel Bleich ever suggest any transaction to you?

A Not to my recollection.

Q Did Jean Donoghue ever suggest any transaction?

A As I testified before, I have never met the person. I don't believe I ever spoke to her.

Q You knew Charles Jordon for about three years before he became connected with Gross & Company, is that right?

A That's right.

Q First you knew him when he was with Shearson, Hammill?

A No, I thought he was with Hayden Stone, but looking at my files I believe he was with Goodkind, Neufeld & Jordon who were clearing through Hayden Stone and residing, if you will, in their offices.

Q The first time you met him?

A The first time I met him in July of 1959.

Q So from '59 through --

A April '62.

Q April '62 you did business with Mr. Jordon when he had nothing to do with Gross & Company?

A That is correct.

Q During that time you spoke to him with some frequency?

A It is a relative question. Some frequency compared to later, absolutely not, but yes, I spoke to him on several occasions in the course of our business.

Q You say you don't recall whether or not you told him that your father was an executive of Georgia-Pacific?

MR. SHAW: Objections, your Honor. I think that is an improper paraphrase of the testimony of this witness.

THE COURT: Overruled.

A Would you repeat the question, please?

THE COURT: Read it.

(Record read.)

A I don't believe I said that.

Q He knew that at some time?

MR. SHAW: Objection.

THE COURT: Overruled.

A I don't believe I said it. I assumed he knew that cause, as I testified before, I invited him to a dinner honoring the chairman and president of Georgia-Pacific at that time where he met my father.

Q When was that?

A That is a good question. I would have to assume -- I know it was when I was doing dealings in this period of time of '62 through '66.

Precisely when I would be hard pressed to even dredge a guess.

Q What I am asking is didn't he know your father was an important executive in Georgia-Pacific?

MR. SHAW: Objection, your Honor.

THE COURT: No, he hasn't finished the question.

MR. SHAW: I am sorry, I thought he was finished. My apologies.

Q Didn't he know your father was an important executive in Georgia-Pacific even before Mr. Jordon came over to Gross & Company?

MR. SHAW: Objection with respect to form, your Honor.

"Didn't he know."

THE COURT: Well, overruled.

A To answer your question, I don't know if he knew. I assumed he knew, but I don't know if he knew.

Q Actually, it was a long time ago and you don't remember exactly what you told him about yourself in that two or three year period, is that a fair statement?

MR. SHAW: Objection, your Honor.

THE COURT: No, overruled.

A Which two or three year period?

Q The two or three year period while you were doing this business with Mr. Jordon before he became connected with Gross & Company?

A The only thing I think I told Mr. Jordon was that I was with Lever Bros.

Q That is not quite answering my question.

A Then I misunderstood your question.

THE COURT: I think it is in the nature of an answer. Put another question, please.

Q This morning when you were testifying -- excuse me, strike that, please.

When did you open your account with Merrill Lynch?

A About 1960.

Q Do you have records here today to tell exactly?

A I have Merrill Lynch records with me. Whether or not, as requested by you in that subpoena that was left at my house.

and I take it you offer them in evidence?

MR. MANDEL: Yes.

THE COURT: Any objection?

MR. SHAW: I object on the ground of irrelevance.

THE COURT: That objection is overruled.

Have you got them?

THE WITNESS: Yes. What period of time did you ask for them in evidence, Mr. Mandel, I am lost.

MR. SHAW: 1963 through '66.

MR. MANDEL: Through the end of '66.

(Defendants' Exhibit C received in evidence.)

Q Now, is it fair for me to say that Mr. Jordon did not tell you what stocks to buy through Merrill Lynch?

A Did not tell me?

Q Yes.

A No, he did not tell me.

Q Hd had nothing to do with those transactions, is that correct?

A Yes, he had considerable to do with the transactions.

Q Will you explain that, please?

A Yes, I don't believe in the opening periods of time of the records that are in evidence he had much to do with them. As time went by I not infrequently bought the same securities through Merrill Lynch that I was buying through Gross & Company at Mr. Jordon's recommendation.

Q But at least Mr. Jordon wasn't getting commissions on those sales?

A Absolutely not to my knowledge.

Q And when you bought 100 shares or 200 shares of a stock through Merrill Lynch, it wasn't because Jordon called you that day and said,"Buy another 200 shares of say Western Equities"?

MR. SHAW: I object upon the ground of relevancy. Activity in another account not related to this account.

THE COURT: Come up, gentlemen, please?

(At the bench.)

THE COURT: So I head this off. Mr. Shaw, you, in your memorandum of this morning, made the statement with regard to Mr. Buckley's extreme naivete as a characterization as the reason why he would be Mr. Jordon's tool. This bears upon whether he is naive or not and there is going to be a lot of evidence, I take it, of this kind that Mr. Mandel may endeavor to elicit and it seems to me is that anything that goes to show that he is an experienced trader bears on his alleged extreme naivete.

The reason I have this at the bench it seems to me that you should keep that in mind in the objections that you make.

MR. SHAW: I am glad you brought that to my attention, your Honor. I had missed something.

THE COURT: All right.

(In open court.)

Q What I am trying to get at, Mr. Buckley, and maybe I can put it this way:

Am I right that this morning you testified that you had certain conversations with Mr. Jordon from time to time when he said and I am quoting you, "Buy 200 Westec," and you said, "Okay."

Is that about right?

A You say you are quoting me and then about right. I don't think I testified that he ever mentioned a number of shares. You said, "Buy 200," it was usually the stock that he said buy. In other words --

MR. SHAW: Mr. Buckley appeared to be cut off in the middle of saying something then, your Honor.

MR. MANDEL: Yes, I apologize.

THE COURT: Complete your answer.

A It has fled.

MR. SHAW: Pardon me.

A It has fled.

THE COURT: Let's go to the next question.

Q I think you were saying that Mr. Jordon said, "Buy Westec, " and then you responded, "Okay, 300 shares," something like that?

A Yes, the latter being based on the amount of buying power either in the account or occasionally cash that I had not in the account, if you will.

Q So that what you are saying is that in these cases he suggested the security and you made the decision as to the amount as well as whether you would go along with him or not?

MR. SHAW: Objection.

THE COURT: Overruled.

A There are two parts to the question as I heard you. Made the decision as to the amount was frequently then based on my asking him is there any buying power in the account which he would then respond to or go back to the margin clerk and ask, so, yes, if he came back and said, "Yes, you have enough to buy 300 Westec, I recommend you buy it, I would buy it." So, yes, a share -- a quantity of shares became involved in the recommendation, but there was a second part to your question that I didn't respond to. Now I have lost that one, too.

MR. SHAW: I wonder if it would be possible to have an instruction to Mr. Buckley if he could possibly speak a little slower because not only I believe is the reporter having difficulty following him, but I think other people in the courtroom might be having difficulty following him as well.

THE WITNESS: Sorry.

THE COURT: Read back the question.

(Record read.)

A The second part of the question as to whether I would go along with him or not I guess I did answer, you are right.

Q Yes?

A Yes.

Q I would like to parallel the way you made your purchases and sales at Merrill Lynch. Was there a person there you dealt with?

A Yes.

Q Who was that?

A What year?

Q You pick the year. Let's say '64, that was a good year, right?

A Okay, I couldn't tell you in '64 because my memory is not that good. The Merrill Lynch was started when a friend of really my best personal friend --

MR. SHAW: Objection, your Honor, this is irrelevant and not responsive. I think the question merely calls for the name of a person.

THE COURT: I think he is getting down to who he dealt with. Do you know his name?

THE WITNESS: Yes, the answer to your question as shortly as I can, I dealt with quite a number of people, at least 10, over the period 1960 to currently. During that period of time maybe five or six.

Q Did they call you or you call them?

A I usually called them.

Q What would happen when you called them?

A It would depend on what my desire was. I frequently deposited shares of Georgia-Pacific with Merrill Lynch as well as with Newburger, Loeb and Gross & Company, if that was the subject, that was the subject.

The transactions, the volition, if you will, was usually mine with them based on either my own feeling or, as I testified just previously, a similar transaction that I had made upon Mr. Jordon's recommendation through Gross & Company.

I would give them the instruction, I wouldn't even ask for their comment.

Q Some of those you say -- some of those trades, purchases or sales originated with you?

A Yes.

Q Where would your ideas come from?

A A good question.

Q Well, maybe I can help you.

MR. GRUTMAN: Let him provide an answer.

MR. MANDEL: One moment, Mr. Grutman.

MR. GRUTMAN: I object, your Honor.

THE COURT: Will all counsel please be quiet and let the witness answer the last question.

MR. SHAW: Could I have the question read back, your Honor?

THE COURT: He asked where the ideas for those transactions which were his own came from.

A Through investment advisory services, mail services, not personal services or various trade digests or the newspapers that were my volition, the transactions that were my volition.

Q Other places, too?

A Period.

Q Friends of yours?

A No.

Q Now, what investment advisory services did you subscribe to?

A I subscribed to one service during this period of time, during my dealings with Mr. Jordon in 1962 through 1966. It was put out by Jerome Peck and Associates, I don't remember the name of the service. I don't believe Jerry Peck is alive or in business.

Q About how much did that cost a year?

A Considerable. As I recall it was over $100 a month.

Q $100 a month?

A Yes.

Q What other advisory service did you subscribe to?

A I hate to mention the name in court, but the Dines Letter.

Q How much did that cost you?

A About $100 a year.

Q I take it that spending $1,300 a year for those services, you read them?

A Yes. Excuse me, Mr. Mandel, spending $1,300 a year, the Jerome Peck relationship did not last very much longer than a year, if that period of time.

Q But at any rate -- by the way, did you subscribe to any other financial publications?

A I referenced other newspapers and magazines.

Publications, yes, not subscribed, I purchased Forbes, I believe.

Q Forbes?

A Quite regularly.

Q Fortune, too, I believe?

A I had a subscription off and on during this time to Fortune, yes.

Q You read those?

A Fortune, not really.

Q Is it fair to say that during this period you were intensely interested in the stock market?

A During 1962 through 1966? Intensely interested in my account, yes.

Q Yes. Is it also fair to say that you were interested in making gains?

A I was not interested in making losses, you are correct.

Q You didn't care if they were long term or short term gains?

A I cared only to the extent that it affected my internal revenue returns.

Q Is it fair to say also, Mr. Buckley, that -- well, strike that.

Do you know what the word leverage means?

A Yes, I do.

Q What does that mean?

A It means a two-way process where you put in a minimum amount of money and you are averaged up or leveraged down. You can make considerably more than your money because of the fact that you borrow brokerage house money for the market or you can lose a substantial amount of money for the same reason. You are dealing with the brokerage house money depending upon the margin requirements up to at least 50 per cent of your investment.

Q Is it fair to say that you employed leverage where you could?

A Absolutely.

Q Now, what that means, to be specific about it, is that when stocks you had went up in price that gave you more buying power?

A Yes.

Q Is that statement meaningful to you?

A Yes, it is.

Q And is it correct?

A Yes, it is.

Q During 1962 through 1966 when you had more buying power you bought more, is that correct?

A Not always, no.

Q But much of the time?

A Much of the time.

Q Using the leverage?

A Using leverage, yes.

Q I think it is also fair to say, is it not, that there was an occasion when, if you had sold your Syntex -- let's start it more slowly.

Excuse me, I will go back five paces.

Before testifying did you talk,within the last month,with Mr. Shaw?

A Before testifying within the last month, yes, I talked to Mr. Shaw.

Q About how many times?

A Not about. I will give you precisely.

THE COURT: How many?

THE WITNESS: Are you speaking to me?

THE COURT: Yes.

THE WITNESS: Once on the phone and four times either at his office or down here.

Q Did you talk with Mr. Grutman before testifying?

A Yes, I did.

Q How many times?

A Once.

Q Now --

A Once in Mr. Shaw's office and I spoke to him here

THE COURT: Then you can't use it with him.

MR. GRUTMAN: Use it with your expert.

THE COURT: If he recognizes this, fine. If he doesn't, let's go on.

MR. GRUTMAN: Fine.

(In open court.)

BY MR. MANDEL:

Q Mr. Buckley, I will ask you to examine the red line on that graph and to state whether, to the best of your knowledge, it represents your cash investment in the Newburger, Loeb account from time to time?

MR. SHAW: Objection to form, your Honor.

THE COURT: Objection sustained.

Mr. Buckley, do you know anything about this Exhibit D for identification?

THE WITNESS: I have never seen it. If I look at it, I might know something about it.

THE COURT: I sustain its objection for use with this witness.

Q Mr. Buckley, did there come a time when Mr. Jordon recommended that you buy Syntex?

A Yes.

Q You said no, is that correct?

A I said no.

Q Did there come a time when he recommended it again and you said no?

A I don't recall a second "no".

Q Do you recall that you told him you didn't want to hear any more about Syntex and if he mentioned it again you would pull out your account?

A In those words, no, I don't, Mr. Mandel.

Q Roughly?

MR. SHAW: Objection.

THE COURT: By roughly you mean in substance?

Q In substance.

THE COURT: Overruled.

A No, I do not recollect that.

Q Do you remember that there came a time when you decided that you would buy Syntex because it had been going up after the recommendation, is that correct?

A That is not correct.

Q You tell me what happened.

A I decided later to buy Syntex. To paraphrase you "because it was going up," I don't remember being an element of the decision one way or another. I do not recollect that.

Q After you made that decision, how many shares of Syntex did you buy?

A May I consult my records?

Q Sure, certainly.

A It would speed the process up, Mr. Mandel, if you can tell me what year was involved so I can just go to that year.

Q I would guess '63, from about the middle of '63 to the end of '63, but that is an educated guess.

A Okay, it will take a minute.

(Pause.)

A Do calls in Syntex qualify as purchasing Syntex?

Q Calls on Syntex?

A Yes.

Q Yes, we will get to calls later.

A But they do qualify?

Q Yes.

MR. SHAW: I would object to that agreement, your Honor, that a call constitutes a purchase of a security. We might get into trouble on this one.

THE COURT: Mr. Mandel has amended it to purchases or purchases for calls.

A Your question was when, is that your question?

Q Pardon?

A Your question was when? August 9, 1963.

Q In toto how much Syntex did you buy?

A In toto.

Q Including the calls?

A Mr. Mandel, not to mislead you, Syntex was split during this period of time. Do you want me to try to adjust as I go along?

Q Yes, please, if you can.

A Okay, from memory it was a two for one split so shares I have marked as old I am just going to multiply by two so everybody understands what I am doing. I recall it was two for one. I can't certify to that.

Do you want me to give a running commentary or add them in my own mind?

Q Any way you like.

A Mr. Mandel, should I deduct puts?

THE COURT: Just answer his question, Mr. Buckley, as to purchases, please.

Isn't this a matter of records?

MR. GRUTMAN: Yes, I think it is, your Honor.

MR. SHAW: It is all in evidence. All these purchases and all these calls and I stopped --

THE COURT: Then we will go forward this way.

MR. GRUTMAN: Couldn't we stipulate to this, Judge. We have wasted 5 per cent of the total time of the afternoon on this one question.

THE COURT: Mr. Mandel --

MR. MANDEL: I don't have the fact and it is a very important question.

MR. SHAW: Perhaps we could get the fact and then come back to this later on, your Honor.

THE WITNESS: I am prepared to answer it.

THE COURT: He is now prepared to answer it.

A 13,100 shares of Syntex bought through both accounts, but the bulk of which was bought through Charles Jordon and Gross & Company.

Q Now, do you happen to know offhand how much money you would have made if you had sold when Syntex was at the top?

MR. SHAW: Objection, your Honor. That is totally irrelevant. What he would have made. That is speculation of the most ridiculous form, what he would have made if. What he actually made or lost, that is relevant, not what might have happened.

THE COURT: No, if he has knowledge of that, I will let him answer it. Do you know?

THE WITNESS: No, I don't.

Q Is it fair to say --

MR. MANDEL: Do you have an objection?

MR. SHAW: Yes, I am going to object to another question on the same ground.

THE COURT: Sir, please sit down until the question is finished. It is very disconcerting to interrogating counsel to have you standing in front of him.

All right, Mr. Mandel, your question.

MR. MANDEL: All right.

Q Now, I am going to go to this chart of yours and ask you if I am right in my understanding that this chart nowhere shows what the net value of your account was at any given time?

A The net value?

Let me make sure I understand your definition of net value. At any one period of time at the end of those years for this chart.

Q That's right.

A The total assets minus the debit balance, is that your definition of net value?

Q All right, we will take that. This chart doesn't show anything about that?

A No, it doesn't.

Q It doesn't show anything about the total volume of the securities in your account, market value on any given day?

A The total volume? Market value on any given day?

Q That's right.

A On any given day. These are as of December 31st of the year end so I assume they show the market value of the total transactions for the year. Not of any given day.

Q You are talking about -- let's get back because I don't want to be donfused about this. This only shows the amounts of money involved in sales minus the cost of purchase of those securities?

MR. SHAW: Objection.

A No, it doesn't.

MR. SHAW: Objection.

THE COURT: It has been answered.

Q No?

A No, it does not show that.

Q This column "Total Transactions," consists of what?

A It consists of the sum of the figure under sales for that year and the figure under cost for that year.

Q The cost was not necessarily incurred in that year, was it?

A Yes, it was. It is again the sum of the purchases made during that year 1962. They do not relate -- excuse me, let me think that one through.

MR. GRUTMAN: Your Honor, I object to the faces of counsel in front of the jury,Mr. Mandel is wagging his finger and making grimaces which I think is entirely inappropriate.

MR. SHAW: I don't mind that as much as shaking his head from left to right in front of the witness.

THE COURT: Did that affect your answer?

THE WITNESS: I didn't see it. I was looking at the chart.

THE COURT: All right. Your question.

MR. MANDEL: I didn't get an answer.

Q You have overlooked, have you not, Mr. Buckley, that you took this from your tax return, so going from your tax return you would know the year in which you sold the security and what you got for it, but it could have been bought in a prior year or a year before that, am I right or wrong?

MR. SHAW: Objection.

THE COURT: Overruled.

A There are many statements in your question. The first one that it was taken from my tax returns I believe is correct.

I do not believe they were taken from the statements, directly from the statements.

The second part I have lost focus of.

Q Your tax returns report your sales for the year, do they not?

A Yes.

Q And they report sales of securities which may have been bought in prior years?

A Yes.

Q So that the cost column may reflect the cost of securities that were bought in prior years?

A That is not correct. It is not precisely correct. You are pointing at 1962. My account started with Newburger, Loeb in 1962 so it had to be so in 1962.

Q Did you sell --

THE COURT: Mr. Mandel, go to '63. Let him answer that question.

Q How about '63?

A Assuming that my recollection that the source of this data is my tax statements, the answer is yes. It does not necessarily include purchases made during the year listed there.

Q Even for '62 you sold some Georgia-Pacific, right?

A I believe that is right.

Q That could have been acquired by you years before?

A That is incorrect.

Q You sold that year's Georgia-Pacific only in '62?

A No. The purchase price of Georgia-Pacific in each and every instance was recorded as zero because it was a tax-free gift to me. My father's purchase price is what I reflect and his purchase price was in essence 78 cents or 87 cents. I never put them down as purchase price. That is purchase profit.

Q Now, at the point that I am trying to make to you is this:

You testified on direct that there was a time when you had $500,000 or $600,000 worth of Westec stock, is that correct?

A $500,000 or $600,000 worth of Westec stock? If you mean by that that I owned Westec stock that was worth at a period in time $500,000 or $600,000, yes,that is correct.

Q It is also true, is it not, that during part of this time you owned Syntex stock that was worth some hundreds of thousands of dollars?

A I can't answer that because the purchases that I gave you of Syntex were also sold and whether or not at any one period of time what I had was worth hundreds of thousands, I can't tell you.

Q All right. Now, I will put it to you for you to say yes or no that there were times during those years when the market value of your stocks, all the stocks in your account with Newburger, Loeb was over $750,000?

A Excuse me, Mr. Mandel. You wanted a yes or no, but when you say market value, that is what you mean,not minus the debit balance. Market value.

Q Right market value?

You have to say yes or no or you don't know, Mr. Buckley.

MR. SHAW: Objection, your Honor.

THE COURT: Let's be patient.

A The figure you have used was over $700,000?

Q Yes.

A It was pretty close. Yes, it is pretty close. Yes. Make it yes.

Q I am showing you a piece of paper with some writing on it. Do you recognize the writing?

A Yes. I recognize the writing as mine.

Q Yes. And am I right that it is a calculation you made at some point of the market value of your securities at Newburger, Loeb & Company? Is that right?

MR. GRUTMAN: Your Honor, I object to this as not being relevant. What we are concerned with here is actual loss, not hypothetical --

THE COURT: The various elements of the churning claim and the various defenses to it.

Overruled.

A Would you repeat the question, please, Mr. Reporter.

(Record read.)

A That is not right. I don't want to mislead you. Newburger, Loeb and Merrill Lynch, but not Newburger, Loeb.

Q All right. Does it show the market value of the Syntex you then held?

A It includes the market value of Syntex. I assume it is a complete listing.

Q What does it show for Syntex alone?

MR. SHAW: Objection, your Honor. I take it that all this has been heretofore offered upon the ground of showing the witness' experience, et cetera, but actually what I owned at any particular point in time I think is irrelevant. Insofar as giving it an actual dollar figure --

THE COURT: Overruled. This is part of Exhibit B?

MR. MANDEL: Yes.

THE COURT: Go ahead, next question.

Q What was the market value of the Syntex alone,

$602,000, am I right?

A No.

MR. SHAW: May we have the time, your Honor?

THE COURT: No, that is it.

Q What was the market value of the Syntex alone?

A Again there is Syntex listed and Syntex calls. Do you want just Syntex, $602,000.

THE COURT: When did you make this calculation, Mr. Shaw asks.

MR. SHAW: Mr. Shaw asked.

THE COURT: You asked to fix the time?

MR. SHAW: When?

THE WITNESS: I assume it was in a period of time relatively within the receipt of the statement.

Q What is the date of that particular statement?

A I can't clear it, but I believe it is December 31, 1963. I can't read it.

Q Mr. Buckley, the point that I am making --

MR. GRUTMAN: I object to a question framed in that fashion and I ask him not to do that.

THE COURT: Sustained.

MR. SHAW: It is cross examination and not summation, your Honor.

THE COURT: I sustain the objection.

MR. MANDEL: All right, I will ask it differently.

THE COURT: Ascertain the facts.

Q In making up this chart, Mr. Buckley, when you are talking about comparing cash in the account to the total transactions, you are not taking into account at all any unrealized profits you may have in the account?

A As I recall, the last column is the net figure of the cash I put into the account for that year less the cash that was taken out of the account.

Q So that this last row (indicating) doesn't show what the account was worth?

MR. SHAW: Objection.

A It is not attempting to.

THE COURT: Overruled.

A Excuse me.

THE COURT: You answered.

Q It doesn't show the size of the account?

MR. SHAW: Objection, your Honor.

THE COURT: No, overruled.

A It shows the cash in the account.

Q It shows what your investment was?

A My net investment.

Q What your cost was at that moment?

A No, it doesn't.

THE COURT: His investment.

Q All right, your investment. Your investment consisted of what, how did you calculate your investment?

A I did this in 1966. My recollection is, as I said two minutes ago, cash in less cash out for that calendar year.

Q Cumulatively?

A Yes, as of December 31st for that calendar year.

Q So that in '63 when you owned $602,000 worth of Syntex, you only had $113,000 of your own money in the Newburger, Loeb account?

A I can quibble with the word only. I had $113,000 in cash.

Q And the difference just on the Syntex alone was I will say only about $500,000?

A Without taking into account the debit balance owned against Syntex.

Q What was the debit balance at that moment?

A Give me back your piece of paper. I will trust you to read it, if you want to. I can't answer the question from this piece of paper in that this shows the debit balance for my account. That scratching at the bottom in my writing is all accounts including my wife's, so I can give you what the debit balance is in my account if you want it. It is $258,875.23.

MR. SHAW: I don't believe we had a complete answer to the question. The witness was about to give us the debit balance in his wife's account, too.

THE COURT: He said it wasn't there.

A It is in Exhibit B.

Q All right, then look at Exhibit B.

MR. SHAW: What is, the date. December 21, 1963?

THE WITNESS: December 31st, I believe.

A As of December 31, 1963 -- scratch that, I am looking at '65. I am a little hazy. As of December 31, 1963 the number listed in the balance account -- in the balance column is $4,325.25. $4,325.25.

Q So having finished with all of that, can you tell us -- strike that.

I want to get back to the board and see if we can make -- is it fair to say that the volume you were able to buy was related to the increase in the value of the account over your cash in? Is that statement meaningful to you?

A I didn't hear the word after "I was able to buy or borrow"?

Q No, the amount of stock you were able to buy was related to your cash investment plus the increase in value of the securities you had in the account?

A Yes.

Q To put it another way: The unrealized gains in the account gave you large buying power?

A It gave me buying power. I don't know what you mean by "large".

Q Well, we are talking about sums --

MR. MANDEL: I will withdraw that. We know the numbers we are talking about.

MR. GRUTMAN: Your Honor, I find it most disconcerting for counsel to continue these aloud musings. I ask that he be instructed to stop that. That is not ascertaining the facts.

MR. SHAW: It is improper. It is a constant running summation and I object to it, too.

THE COURT: I don't think it was either intended that way nor did it have that affect. I agree it is appropriate that counsel not issue a statement until it becomes a question.

MR. MANDEL: All right.

Q Is it also fair to say that this chart only shows realized gains and losses?

A As I testified a few minutes ago, to the best of my knowledge it is an abstract from my internal revenue statements which would answer that, which would be in that definition that you just gave.

Q Now, I would like to talk about the transactions account and in 1962 you say there are 110 transactions. I am asking you whether that means 110 round trips or 110 one-way trips?

MR. SHAW: Objection to form, your Honor.

Q Do you understand that question?

A No, I don't.

THE COURT: Do it again.

MR. MANDEL: I will rephrase it.

THE COURT: Why don't you let the witness tell you what it means and then we will avoid that problem.

THE WITNESS: I'm sorry, your Honor, I don't know what round trips in the securities market means.

THE COURT: What does 110 mean?

THE WITNESS: To the best of my recollection when I did this statement it meant that I had the sum of 110 purchases and sales. Not necessarily of the same security.

THE COURT: Each transaction was a purchase or a sale?

THE WITNESS: Yes, to the best of my recollection.

THE COURT: 110.

Q Now, if you order the purchase of 1,000 shares of let's say Syntex and it came in 200 shares, 300 shares, 300 shares, 100 shares, 100 shares, is that one transaction or five transactions in this column?

A I think youwent over 1,000, but independent of that, I know what you mean. I believe when I did it that I used the number of transactions -- my definition of transactions was an entry on the statement, the statement -- these statements such that in your instance, if I had 1,000 shares of Syntex ordered, not as five 200's, but it was executed as five 200's, it would be listed as five transactions.

Q If you sold 1,000 shares of Syntex, the same -- broken up the same way, that would be then ten transactions?

A In that instant that you are citing, yes.

Q Now, we get to your handling of puts and calls. Did you engage in puts and calls?

A I engaged in calls, but I did not engage in puts other than on a very minor number of occasions.

THE COURT: What are they, please, so the jury knows what we are talking about?

THE WITNESS: That is a good question.

It is not analogous to a short, but it sort of is. One does not own the physical security, the piece of paper that says you own one share of AT&T.

You can buy an option, you can purchase an option to buy a share of AT&T at 49, say.

You haven't bought the one share at 49 so you don't own the $49. What a dealer in the market who at that time was called a put and call dealer would do is charge you something for that option just as if you bought an option on a house or an option on a business or a piece of land. It usually was fairly fixed, but like the stock market it is a function of supply and demand such that it isn't any 10 per cent or 2 per cent, it is supply and demand enters into it, but it is in the range of a certain per cent.

You bought them for a certain amount of time like any option so that in that instant if I bought a call, which is an option to buy one share of American Telephone & Telegraph at 49, I would own -- that call would be good for a certain period of time, say six months. I would have any time in that period of six months, The person selling me the call would have to then give me the AT&T stock if I then gave him the $49 and the purpose being that if the stock went to $55, you only had to pay $49.

If it went down at the end of the fixed period of time it was worthless. My definition of it is an extreme speculation.

Excuse me, assume Mr. Mandel said or his Honor did. A put is the reverse. You think the stock is going down. So $49 a share for AT&T --

MR. SHAW: I think this is just complicating and confusing the jury. There are no puts involved in this case so it is required.

THE COURT: That was my question because the witness had described that in a statement and I thought the jury should know what he was talking about.

MR. SHAW: The problem is there is already so much in this case that since puts don't involve this case, I don't think we should complicate it any further.

MR. MANDEL: I am interested in this witness' understanding of a put, your Honor.

THE COURT: We will have it.

A A put is the converse. If you thought AT&T were going down, again six months, you could buy a put which in effect meant that you thought that the stock were going down and the person who bought it from you would never call it because he would have to pay $49 a share to me when he could buy it on the Stock Exchange for something less, say $45 if in fact it went down. In that case you had income from the selling, in this instance a put. That is how I understand it.

How accurate that is I would leave to someone else.

MR. MANDEL: Thank you.

Q Mr. Buckley, your account of transactions --

A Pardon me?

Q Your account of transactions, how did you handle calls?

A As a transaction.

Q If you bought a call on 10 shares of AT&T, that was one transaction?

A If that was the entry on the statement, yes.

Q If you exercised the call, how would you handle that?

MR. SHAW: Objection unless there is some testimony that he ever exercised any of these calls.

MR. MANDEL: Come on.

THE COURT: Let's lay a foundation.

Q Did you ever exercise any of your calls?

A Not that I recall.

MR. SHAW: That is the point. That is my understanding, too. Thank you, Mr. Mandel.

MR. MANDEL: We will see.

Q Mrs. Buckley, do you know what salvaging a call means?

A No, I don't.

Q All right, you may be unfamiliar with the term. Suppose, take this hypothetical case --

MR. SHAW: Objection, your Honor. This has no bearing at all on this witness' --

THE COURT: Do you represent that this is something that was involved in these transactions?

MR. MANDEL: I think it is.

MR. SHAW: That is not enough, your Honor. I submit the case is being cluttered with extraneous issues.

THE COURT: No, if counsel represents to me that there were some transactions of puts and he has a reasonable basis to believe that the evidence might show existed, I will allow him to explore it.

Do you represent that to me?

MR. MANDEL: Yes, I believe Mr. Buckley made salvaging calls and I think his knowledge of that kind of transaction is relevant.

THE COURT: All right.

Q Mr. Buckley, suppose you have a call that you have paid $5 to buy AT&T at $50 and the call has expired and the price of AT&T at that moment is $53.

If you exercise your call, you will save about $3, will you not? Do you understand me?

A If I exercise the call meaning I request the seller of the call to deliver the stock to me; yes.

Q You are buying the stock at $50?

A In that instant.

Q It really costs you $55 because you paid $5?

A For the option.

Q For the option, but if you just let the option expire, you would lose $5 instead of $3?

A $2.

Q Did you ever have any transactions like that?

A Not that I recall.

MR. SHAW: Objection, your Honor, and I move to strike all that testimony. There was a representation that it was relevant and it is not relevant because there weren't any deals in this account.

THE COURT: It is in the record. I don't see any basis for striking it.

MR. GRUTMAN: Your Honor, I object on the grounds that Mr. Mandel made a representation to you that he was going to establish that there was this kind of exotic incident as a matter of fact applicable to this witness. The witness has testified, A, that he didn't know what salvaging a call was. Nonetheless Mr. Mandel put the question. Now that the question has been put, the witness says, "I don't know that I have ever had such a transaction."

THE COURT: Haven't you ever gotten an "I don't know" answer?

MR. GRUTMAN: What we have being conducted by Mr. Mandel is an endeavor to ask an awful lot of sophisticated questions and this witness is not an expert.

THE COURT: Mr. Grutman, I don't want to get into any speeches on the record. Your objection is overruled.

MR. GRUTMAN: Would your Honor instruct Mr. Mandel not to ask any further of these expert questions except on his belief that there is such a transaction.

THE COURT: I am sure Mr. Mandel was not in good faith, but it did not bear fruit in this instance. Let's go forward.

Q Did you ever exercise any of your calls?

THE COURT: He said he did not.

Q You never exercised them? He said he didn't salvage them?

Did you ever exercise any of your calls?

A May I look?

Q Yes, certainly.

A You want an ever answer, not a complete answer.

Q We will start with ever and then I will let you go on.

MR. SHAW: Mr. Mandel, would you mind if I took those exhibits from the witness that you are not using, 9 through 21?

MR. MANDEL: Sure.

MR. SHAW: Excuse me for a moment.

A Yes, the first page I turned to I see an indication of an exercise of a call.

Q Which page is that?

A It is not on your records. It is on my personal records.

Q Your personal records?

A Yes.

Q Just so we will make it clear, what was the date of that?

A The date is January 10, 1963 on the purchase of the call, not on the exercise.

Q On January 10, 1963 you bought a call on what?

A I bought three calls on Fifth Avenue Coach Lines.

Q So that would be for 300 shares?

A Yes.

Q And what did the call cost?

A The call cost $4.25 per share.

Q And what was the call price?

A $29.

Q Then what happened?

A It was a six month calling meaning having purchased it on January 10th I had to exercise it six months later. I have an entry of July 22nd, which was a little more than six months later so maybe it was six and ten, something like that, these may be imprecise,they were exercised at the price of $29 for a total of $10,090.08.

Q After you exercised, did you sell the same day?

A Yes, I did.

Q For what price?

A $31,25.

Q So --

A If you want to know if I lost money?

Q Yes.

A I lost money on the transaction.

Q So you salvaged a call then?

A Not the way I understand your salvage.

Q You exercised --

A I exercised it, not salvaged it.

Q All right, you exercised a call, but lost money on the total transaction?

A On the buy and sell, yes.

Q Because the purchase price plus the call price were a little bit higher than the market price?

A A little bit is a relative word. They were $2 more or 50 per cent more. I don't consider that little, personally. 50 per cent increase on the purchase price of a call to me is not little.

Q No, but it was not a 50 per cent difference on the price of the stock?

A No. We are talking of the call, though.

Q 50 per cent gain on the price of the call?

A 50 per cent loss on the price of the call.

Q Loss on the price of the call.

I am getting back to the transactions. In order to do that call transaction you show a purchase of a call, a purchase of stock and the sale of stock, right, three transactions?

A Yes, on this record I show three, yes.

Q It would be three transactions on your chart, right?

A In the same calendar year, yes, it would be, all 1963, I think you said.

Q Not only that, when you -- typically it is true, isn't it, that when you exercise a call, you buy and sell the stock the same day, you have really been speculating on the movement of the call, but you close out the transaction by buying the 100 shares and selling the 100 shares simultaneously?

A If you do do it simultaneously. I don't know that I ever did or don't know that I never didn't or whatever the word is. I don't know that I always did do it simultaneously.

Q In this particular case, you did?

A Yes, I did.

Q And getting to the total transactions' volume, you included the price of the stock you bought and the price of the stock you sold simultaneously. To reach these figures in the next to the last column, am I right?

A If done in the same year.

Q Yes, if they were done in different years, they would be caught in different years, but what I am suggesting to you, and you tell me if I am not right, that when you are trading in calls, the collar volume of transactions passing in and out of the account is artificially large because you are buying stock and selling it simultaneously. Does my question make sense to you?

A No.

MR. GRUTMAN: Not to me, Judge, and I object to it as unintelligible.

A No, it is not intelligible.

Q I will try again.

MR. SHAW: Your Honor, I would like to have a continuing objection to the asking of very complicated questions with respect to the purchase and sale of securities. We have gone on forever in this area. It is not related to this case. It seems to me it gives an artificial impression.

THE COURT: Mr. Shaw, these questions are related to the weight and purport of the chart that you put in evidence and therefore your objection is overruled.

Q Do you recall we had the example of a call on AT&T?

A Yes.

Q You told me, if I understood you quite properly, that what you were looking for there is extreme speculative leverage through the call, is that right?

MR. GRUTMAN: Objection. He never said that.

THE COURT: What is this?

MR. MANDEL: I believe that is what he said to the jury.

MR. SHAW: Objection.

THE COURT: Could I have the question read back.

(Record read.)

A I don't -- I did not say that.

MR. SHAW: Please, there is an objection.

THE WITNESS: I'm sorry.

THE COURT: Ladies and gentlemen of the jury, whether certain answers were given before is a matter on which your recollection governs. You as the tryers of the fact have to determine what the testimony was and if counsel or I happen to misstate what evidence has been heard, it is your recollection that governs, if your recollection differs from anyone's.

In this case, Mr. Buckley, did you say that a call is a speculative investment? You used that word.

THE WITNESS: I believe I said that I consider the dealing in puts and calls as extremely speculative.

THE COURT: Yes, I seem to recall. He said he regarded dealings in puts and calls as extremely speculative.

THE WITNESS: I'm sorry, Judge, I did not say that. I said I consider, I did not say I regarded.

I said right now I consider it extremely speculative. In 1962, did I, no.

THE COURT: I see, all right. I don't mean to drift around the question.

THE COURT: Very well. On that basis,go ahead.

Q What was the question?

Could we have that question read back?

(Record read.)

A That is not right.

Q Is a call a device of extrme leverage?

A Yes.

Q And is a call a device of speculation?

A Is it?

Q Yes.

A Yes.

Q There is no doubt about that, is there?

A In my mind, no.

Q Now, the point I am trying to get back to is this:

At the end of the call period, when you buy a call, you don't ordinarily -- I am talking about you in this period -- by that call so that you will acquire ultimately a stock to hold as an investment.

A That is incorrect.

Q That is incorrect?

A That is incorrect.

Q You tell me what is correct?

A What is correct is that when I purchased calls, specifically Fifth Avenue Coach Line calls, I was buying time. That is what you pay the premium for is time.

I hoped that when the time -- I hoped that when the date for the exercise arrived that the price of the stock would be sufficiently higher that I would have the choice of either exercising and buying the stock and keeping it as an investment or selling or buying -- excuse me -- or exercising the option and buying and receiving the stock, and then selling it or strictly of selling the call.

So I was buying time to do one of three things, not just one, but my choice of having one of the three is what I was paying for.

Q It would give you an opportunity to decide later?

A Yes.

Q Which way to go?

A Yes.

Q What factors would enter into your decision at the later date?

A The primary one being the price of the stock at the later date.

Q Now, in practice how did it work out? What happened when most of your calls matured?

A Most is a long period of time. I will start. Fifth Avenue Coath it worked out for marginal dollar losses and big per cent losses.

MR. SHAW: I didn't hear that, your Honor.

A With the instant we just cited of Fifth Avenue Coath it worked out for marginal dollar losses and large percentage losses.

Q Let me explore that.

Is when you say big percentage losses, you mean on the percentage invested in the call?

A That is the only thing I invested in.

Q You bought the stock in the end?

A And sold it on the same day. There was no cash out of my account on that day.

Q Exactly. Exactly.

MR. GRUTMAN: Here we are, your Honor, once again this little man doing these things.

THE COURT: All right, your point is well taken. Do not underscore the witness' answer.

MR. MANDEL: All right.

Q You say there was no money in or out of your account on that day, but how did you treat it in total transactions?

A I believe I answered it before. As I recall, this listing of transactions was a straight pickup from the statements received each month from Newburger, Loeb and Gross & Company. If they were listed as separate transactions, it was picked up as a separate transaction.

Q I now come back to the question I asked you earlier,

Don't you agree with me that those call transactions artifically inflate the total transaction column?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A No, I do not treat it unfairly as representing over whatever word you used.

Q Nothing on your chart purports to compare the volume of transactions in dollars with the dollar market value of the account, does it?

MR. SHAW: Objection, your Honor, that is a repetition.

THE COURT: Yes, I think it is.

Sustained.

Q Mr. Buckley, at the risk of being --

MR. SHAW: Objection.

MR. GRUTMAN: Once more, Judge, please.

You know this is calculated. He sits there and grins.

THE COURT: Gentlemen, please. Now we are -- sit down, Mr. Shaw, I am not going to have this. I am not going to have this from any counsel. We are going to put questions to the witness. We are going to make objections in proper form and we are not going to make speeches. We are not going to editorialize. We are going to question.

Let us go forward in that spirit.

Put your next question, sir.

Q Mr. Buckley, what is a discretionary account?

A I can't tell you what it is. I will tell you my interpretation of what it is which may or may not be accurate.

A discretionary account is an account where the client, in this instant, myself, would give the broker an, I believe, written instruction that the account may be handled without specific buy and sell consent by the client.

Q You never gave -- you never had a discretionary account with Newburger, Loeb & Company, did you?

A No.

Q You never gave any discretionary power to Mr. Jordon, did you?

A No, I did not.

Q Not at any time from the time you first did business with him, until 1969 until the last time you did business with him -- excuse me, I said '69, I should have said '59 -- until the last time you did business with him which I believe was '69, is that correct?

A I believe you are right.

Q Now, the fact is that in all the transactions you had with Mr. Jordon there wasn't a single transaction which you did not authorize in advance?

A I believe I went into that several years ago. To my knowledge there was no transaction that I did not authorize in advance.

Q And Mr. Jordon never asked you to give him the power to do transactions without your authorization?

A I do not recall the answer to that.

Q If he had asked you, you wouldn't have considered it for a second?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

THE COURT: Yes, sustained.

Q I believe you were asked this morning something about whether you were a member of a privileged class. Do you recall such a question?

A Yes, I do.

MR. SHAW: Objection, that wasn't the question.

THE COURT: The witness rest the subject matter. Let's go forward.

Q Will you agree with me that at least to some extent you were privileged in being able to make large bank loans?

MR. GRUTMAN: I object to that, Judge. I don't know what that is.

THE COURT: Yes, sustained.

Q You testified this morning about a $257,000 bank loan with the Scarsdale National Bank.

Did you put up collateral for that?

A I believe I did.

Q You did?

A I said I believe I did.

Q Pardon?

A I believe I did.

Q What collateral did you put up?

A Georgia-Pacific stock.

Q How much Georgia-Pacific did you put up?

A I don't know. I assume it was adequate to cover a portion of the loan.

Q You didn't tell us about that ownership of Georgia-Pacific.

MR. SHAW: Objection, your Honor.

THE COURT: Sustained.

Q How about the Chase Manhattan?

A The same.

Q You also owned Georgia-Pacific stock?

A I also owned Georgia-Pacific stock and I believe I placed it as partial collateral for the loans listed thereon which, isolated from the other, I cannot recall.

Q So that if you are talking about a net worth statement, assets and liabilities, there is something missing?

A No.

Q Where does this Georgia-Pacific stock show?

A I believe there is $48,000 worth of it listed under the asset solumn or $68,000. No, $48,000.

Q Are you saying to me that this $48,000 of Georgia-Pacific would be only collateral for these three bank loans which go to about $360,000 or $370,000?

A No, I am not saying that to you.

Q Was there more Georgia-Pacific stock?

A Yes, there was.

Q Where is it shown on this statement?

A It is not an asset of mine.

Q Mr. Buckley, you take the liability in full?

A It was a liability of mine.

Q But the liability is either diminished by the collateral or the collateral must go into the asset column?

A That is incorrect.

Q Well, can you explain that?

A Yes. The liability column, we will start with that one because it is obviously larger. I signed notes, demand notes from these three banks, the Scarsdale National Bank, the Chase Manhattan and the Monmouth County Bank to that degree listed thereon as of December 15, 1966.

The assets that I owned at that time in stock, again a portion of which I believe was pledged as collateral to the tune of $48,000. The balance of the stock, it was not an asset of mine that was pledged as collateral for the demand notes was hypothecated stock of Georgia, Pacific.

MR. GRUTMAN: Whose stock was it?

MR. MANDEL: Wait a minute, Mr. Grutman.

Q If I understand you correctly, you are now saying that these loans were collateralized by somebody else's stock?

A You say I am now saying. I don't recall ever not saying if asked that question.

THE COURT: You were not asked that question.

Q I don't mean to quarrel with you on that.

THE COURT: Who owned the collateral?

THE WITNESS: My father owned it.

THE COURT: Ladies and gentlemen, we will take our mid-afternoon recess.

(Recess.)

(In open court, jury present.)

BY MR. MANDEL:

Q Mr. Buckley, I think that you told me on deposition that you had three friends in the investment world during this period of '62 through '66, am I right?

A That is correct.

Q Would you name them, please?

A Yes, I will, if it is important. If it is considered germane.

THE COURT: Yes, please do.

A One friend is W. Peter Irish.

Q What company was he associated with?

A In this period?

Q Yes.

A I believe Merrill Lynch. He was the person I started to refer to earlier when I was stopped.

Q Yes, go on, please.

A The second person is Richard Clancy. He was a partner in Brokaw, Schaenen & Clancy.

Q What kind of company was that?

A They didn't handle any of my business so I can just give you an impression. They managed accounts of individual clients I believe only individuals, although I may be wrong, who had substantial positions in the stock market.

Q The third friend.

A I don't know his name. I remember his firm is Faulkner, Dawkins & Sullivan.

Q What kind of firm is that?

A I believe a similar function to the second one, but it was and still is my understanding that they handle institutional clients as well as individuals.

Q From time to time you discussed stock market questions with them?

A The first person certainly. He at one time was my broker at Merrill Lynch. That is Mr. Irish.

Q Yes.

A The second person, Mr. Clancy, I don't recall ever discussing the stock market, quote, unquite, with.

The third person I remember discussing only a specific stock with.

Q Pardon?

A I remember discussing only a specific stock with him.

Q Which stock did you discuss?

A Another tech, All-Tech.

Q Now, with Mr. Clancy you said you did not discuss the stock market, but did you discuss individual securities from time to time?

A No, one stock, Westec, Western Equities.

Q There were times during those years, '62 to '66, that you got ideas for purchases for investments from other sources, is that correct?

A Yes, I believe we went into that earlier.

THE COURT: The answer is yes.

THE WITNESS: Yes, excuse me.

Q Would you sometimes discuss those possibilities with Mr. Jordon?

A Yes.

Q And it was a two-way discussion?

MR. SHAW: Objection.

THE COURT: Does the question mean anything to you?

THE WITNESS: Two-way does. Did he say anything?

THE COURT: Overruled.

A In my understanding of two-way, did he say anything, did he say something, yes, he would say something.

Q You discussed potential investments back and forth, right?

A No, not right. Not right as a generalization even.

Q You tell me.

A As I testified before and gave you in my deposition four years ago, the bulk of the transactions in my dealing with Mr. Jordon were of his suggestion and his volition. The balance were mine. I discussed --

MR. SHAW: I object to interrupting the witness. He said go ahead and now he is trying to cut him off.

MR. MANDEL: I move to strike on the grounds the answer is not responsive.

MR. SHAW: I object, your Honor.

THE COURT: What is the question?

(Record read.)

THE COURT: We are in the area of your having gotten investment ideas from other sources and going to Mr. Jordon, is that correct?

MR. MANDEL: That's right, your Honor.

THE COURT: Strike out that answer. It is in connection with your conversations with Mr. Jordon in that area that you are being inquired of. When you would go to him and have a discussion with him, if you did.

THE WITNESS: Yes. You would like me to

relate what my recollection is of these discussions?

MR. MANDEL: Yes.

THE COURT: That is correct.

A Right.

The discussions would be I read about X stock. What do you know about it, in effect?

Mr. Jordon would tell me if he knew anything about it and he would tell me if he didn't know anything about it. That is a very broad, broad generalization but that is my recollection.

In answer to your question, when I led a discussion of stocks I was interested in, that was the substance of the conversation.

Q Sometimes you would buy those stocks and sometimes you would not?

A That is correct.

Q I think you just mentioned that you may have heard of these investment opportunities from something you read, but you sometimes heard of them from your friends, too, is that not correct?

A You speak about friends. We mentioned three friends before, correct?

Q Yes.

A I have already testified that for two of those friends I never discussed anything with them nor they with me other than in two instances, Westec being one and All-Tech being the second.

The third party, a personal friend, was also one of my initial brokers at Merrill Lynch. He would mention stocks to me that he was interested in, yes.

Q I would like to read to you from page 38 of your deposition.

MR. SHAW: May we have a moment, your Honor, to get it out?

THE COURT: Certainly.

MR. MANDEL: June 11, 1971.

THE WITNESS: Could you wait until I get mine, too?

MR. SHAW: Page?

THE COURT: 38.

Q I am going to start on line 10, page 38 and did I ask you this question:

"Q While you were doing business with Mr. Jordon, were there occasions you made independent inquiries or investigations or studies of various stocks?"

A Mr. Mandel, I would have to take it from you that the question means you talking at that time?

MR. MANDEL: Yes.

MR. GRUTMAN: Your Honor will see at page 38 and going over to page 40 where there are a lot of questions asked, there is no inconsistency with what the witness has already testified to and I object.

THE COURT: Inconsistencies if they exist and are matters for the jury and the objection is overruled.

Q Do you have a copy of this to look at?

A Yes, I do.

Q I asked you:

"While you were doing business with Mr. Jordon, were there occasions you made independent inquiries or investigations or studies of various stocks?"

Didn't you answer, "Yes, there were," and then say, "Of Mr. Jordon."

Am I right so far?

A That is correct.

Q "No, of the stocks.

"A Yes."

Did I ask that question and you give that answer?

A Yes.

Q Did I then ask this question and did you give this answer:

"Q What kind of things were you doing for example?

"A I do have other friends in the business and as someone would mention something, I would typically inquire of Mr. Jordon what he thought of the situation and in instances those stocks I assume, after being checked by Mr. Jordon, would be bought in some instances and in other instances they were not."

Did you give that answer?

A Yes.

Q Are the friends that you had in mind when you answered that question the same or limited to those three people you have named?

A Yes.

Q Yes?

A Yes.

Q You never got any stock suggestions from anybody but those three?

MR. SHAW: Objection, your Honor, there is no such testimony.

THE COURT: He is just asking.

A Ever?

Q I am talking about in response to this question. Let me try it this way.

THE COURT: No, let's have the answer to the question to which there was an objection which I overruled.

You go too fast, gentlemen, and you get off into byways. Read back the question, please.

(Question read.)

A Never is a big word. I would modify it if I said never or ever meaning that I may have at one time or another. Ever or never may have gotten a stock suggestion from somebody else.

Q Since a long time has gone by and this deposition was taken in '71, may I ask you to look at your answer on page 17 -- on line 17 to see if this refreshes your recollection in any way that in fact you did get suggestions that you took up with Mr. Jordon from more persons than those three you mentioned?

A Mr. Mandel, you asked me to read line 17, is that what you said?

Q I am asking you to read to yourself your answer from line 17 through 22 and see if that refreshes your recollection?

A It refreshes it and it is identical with what I just said independently.

Q Do you remember buying Callahan Mining stock?

A Yes.

Q You bought that in both accounts, did you not, Merrill Lynch and in the Newburger, Loeb account?

A You have my records. If I say I did, I did. I don't remember.

Q Do you happen to have --

A I have the Newburger, Loeb. You have my Merrill Lynch account.

MR. SHAW: I so stipulate that there are transactions in both accounts with respect to Callahan Mining. I have seen them.

Q Where did the Callahan Mining suggestion come from?

A From me.

Q Where did you get the idea from?

A I don't know.

Q How much Callahan Mining did you buy?

A I would have to consult my records.

Q How much did you buy in each account?

A My records don't always indicate the account. They do in most instances. I will try to differentiate in each account, but I can't verify that ahead of time.

(Pause.)

A To assist me could I have a piece of paper to add these up?

Q Would you estimate, would you say about 10,000 shares?

A No, I can't estimate, that is what my problem is.

Q Do you want to add up as we go along?

A You call up the numbers and Mr. Shaw can add them up.

MR. SHAW: Thank you.

MR. MANDEL: Or we will add them.

MR. SHAW: I will be more than glad to do this.

A 1,500 shares through Newburger, Loeb. Do two columns. 600 in the second column, meaning Merrill Lynch.

11,900 Newburger, Loeb. 3,000 Merrill Lynch.

5,000 Newburger, Loeb.

45 stock dividend, not a purchase.

1,000 Merrill Lynch. 600 Merrill Lynch.

1,000 Merrill Lynch. 2,200 Newburger, Loeb.

900 Newburger, Loeb.

4,100 Newburger, Loeb.

I believe that is all.

Sorry, 2,000 Newburger, Loeb. I believe that is all.

MR. SHAW: Newburger, Loeb I have 23,600.

MR. ROTHMAN: 27,600.

MR. SHAW: You are probably right. The other one is 6,400.

MR. ROTHMAN: I have less in the other.

MR. MANDEL: Mr. Rothman gets a little less.

Q Can we say about 30,000 shares of Callahan?

A Yes, we can.

Q That means sold, too?

A Yes.

Q Now, Mr. Buckley, when you started to do business with Newburger, Loeb, you knew the market was a two-way street, didn't you?

A Yes.

Q You knew people could lose money as well as make money?

A Yes.

Q You knew you were taking risks?

A Yes.

Q And you intended to speculate?

A That word was foreign to me at the time. That was not an intention, no.

Q Did there come a time when you were doing business with Newburger, Loeb when you recognized you were speculating?

A Yes.

Q And you wanted to speculate at that time, did you not?

A I believe I testified before I had no investment objectives per se other than to "make money."

Q You wanted to make a lot of it?

A A lot is relative. I wanted to make money.

I will limit it to that.

Q But there were times when you could have had a $400,000 or $500,000 profit and you weren't satisfied with that?

A There were times, that is plural. That is certainly true of Westec when it closed down. I don't know that it was true of any other situation.

Q At least you could have had more than a quarter of a million dollars when Syntex was near its top?

A You seem to be more conversant with that total than I am, so if you stipulate it is right --

MR. SHAW: I will not stipulate.

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q You knew that at any moment you could say, "Sell anything you have got," right?

A Did I know; yes, I did.

Q You knew that at any moment you could say,"Close out my account"?

A Yes.

Q And you knew that at any moment you could transfer your account wherever you liked?

A On the latter question pending successful agreement on the debit balance, yes.

Q You knew that you could say no to any suggestion or yes to any suggestion, is that right?

A Yes.

Q From 1959 until 19 -- the middle of 1966 you were satisfied with what was going on in your account, weren't you?

MR. SHAW: Objection, your Honor.

MR. MANDEL: I will withdraw that.

MR. SHAW: I will withdraw my objection.

Q You kept--did you not, while you were doing business with Newburger, Loeb, you promptly received confirmations of every transaction?

A Yes.

Q And you received monthly statements on time every month?

A On time, yes. Yes.

Q You kept and collated those records, did you not?

A Kept is all inclusive. I have not had them in my possession for several years.

Q Because of this litigation

A Exactly.

Q But until 1971 you have had them in your possession?

A Yes, I did.

Q And then they were turned over to lawyers?

A Yes.

Q Now, you kept your own records of what you were doing?

A Yes.

Q And you still have them?

A Yes.

Q You have been using them today to testify?

A Yes.

Q You kept separate sheets with regard to each security, is that right?

A Separate sheets, no, separate entries with regard to each transaction.

Q With regard to each transaction?

A On a chronological basis.

Q You did this in your own hand?

A Yes.

Q You understood the statements and confirmations that you received?

A Well, yes.

Q You did your own tax returns?

A I was assisted one year on my tax returns, but, yes.

Q Basically you did your own tax returns?

A Yes.

Q The records that you had of your stock market transactions enabled you to do the tax returns without trouble, right?

A Yes. Other than in one instant.

Q The one year you had some special technical tax problem, is that right?

A No, no.

Q I am sorry, we are missing each other.

A To repeat as I understood the question, you said did I prepare my tax statements with no problem from the records that were available to me and I said yes, except in one instant.

Q What was that instant?

A When Westec closed down.

Q That created a problem?

A Yes, it did, a very large one.

Q Now, let's talk about Westec. When did you first begin to buy Westec?

A I believe the same date I said before because I looked it up. I believe it was July 6, 1964 in my wife's account.

Q You started buying it at about 3?

A Yes.

Q And you continued buying it on the way up until about 14, is that right?

A To answer your precise question, yes, that's right.

Q Did you do some selling and buying back in the meanwhile?

A Yes.

Q You were dealing in Westec in your Merrill Lynch account and in your Newburger, Loeb account, is that right?

A Dealing implies buying and selling. I don't know that I sold Westec in my Merrill Lynch account until shortly before the close. I don't know that.

Q Westec was one of the most volatile securities of its era, wasn't it?

A You are asking me my impression?

Q Yes.

A Volatile implies to me up and down. That is what it implies to me.

Q Yes?

A Using that definition it was not one of the most volatile of that era.

Q You are saying it was your impression that it was one way up?

A No, I didn't really say that. My impression is that it basically was up. That means it didn't have declines -- excuse me.

Q You accumulated,what did you say, about 1,100 shares, 11,000 shares of Westec in Newburger, Loeb and 3,000 some odd in Merrill Lynch?

A That is not correct.

Q You tell me.

A My position when the stock closed down was that I was long 11,300 shares of Westec in the Newburger, Loeb account and when it closed down I was 2,500 shares long in the Merrill Lynch account.

Q How high did the price of Westec go while you were holding it?

A I believe in the mid-sixties.

Q Your highest acquisition price was 14?

A That is either correct or awfully close to it, yes.

Q Do you have an idea of what your average acquisition price was?

A That I was left with? The 11,300?

Q Yes.

A No -- yes, I have an idea. The answer is it must have been around 10 or 11, but I never worked it out.

Q So that looking at the Newburger account alone --

MR. SHAW: Objection. The constant repetition of the Newburger, Loeb. I haven't minded so far but it should be stressed that it is a Gross & Company account cleared through Newburger, Loeb & Company.

THE COURT: I think that is clear enough, go ahead.

Q Looking at the Newburger account alone --

MR. SHAW: It doesn't do any good, I object. It is a Gross & Company account at Newburger, Loeb. The record should be clear on that rather than constantly being misstated. I am sorry, your Honor.

THE COURT· The witness has been talking about his Newburger account.

MR. GRUTMAN: Only because the questions imply it. It is a Gross & Company account, your Honor.

THE COURT: Mr. Grutman -- Mr. Buckley, how do you characterize these two accounts. How do you describe them? One is Merrill Lynch and how did you describe the other to yourself?

THE WITNESS: The Newburger, Loeb account.

THE COURT: All right, we will go foward on that basis. Go ahead.

Q Now, assuming the price of 10 --

A An average price of 10.

Q An average price of 10?

A Yes.

Q For your 11,000 shares, it was really a little more, and assuming the high price of 62, at that point how much of a profit would you have had if you had sold out the Westec which you held in Newburger, Loeb?

MR. SHAW: May we have the time, your Honor?

THE COURT: I think the time has been fixed.

MR. SHAW: Right before it closed?

MR. GRUTMAN: Fine. I withdraw my objection.

Q About when did it reach the high?

MR. G[illegible]MAN: No, may we have the answer to the question that w[illegible] posed.

MR. MANDEL: Wait just a second. Excuse me, your Honor.

THE COURT: Gentlemen, Mr. Mandel puts a question, somebody jumps in and says I want the time. We then try to fix the time and somebody else jumps up from the front table and says, "I am not clear on the question," and the next thing you know we are out in Foley Square.

Can I have the question of Mr. Mandel's and we will get an answer to that question.

MR. GRUTMAN: The earlier question.

THE COURT: Let's avoid this.

(Record read.)

THE COURT: You may answer.

A Assuming our early estimate of an average price of $10 a share is accurate and assuming the 62 was the high point, I said the mid-sixties is accurate, that would be 51 points times 103, that works out, you do it. it must be about $550,000.

Q You were hoping it would go higher, is that right?

A I don't recall my specific hope at the point in time when it was 62. No, I do not.

Q You had it in mind, did you not, that every time Westec went up one point you would make $11,200 in your Newburger, Loeb account?

A $11,300.

Q $11,300.

You did not take that profit?

A If taking the profit means selling the security at 62, no, I did not take the profit.

Q And you knew you had the right to do that at any moment if you chose to do so?

A Yes, I knew I had the right.

Q Can you now fix the approximate date, about when did it reach the high?

A Of 62?

Q Yes.

A It closed -- may I talk out loud or just give you an answer?

Q I would prefer an answer. I am asking for a rough approximation of a month or so. Sometime in '66?

A Yes, sometime in '66.

Q About when?

A The early summer.

Q In the early summer.

Now, there came a time, did there not, when Westec began to go down?

A Yes.

Q And one day something terrible happened, the security was banned from further trading, is that correct?

A I don't think they -- maybe they used the word banned. It was suspended from trading by the American Stock Exchange and the SEC.

Q That meant that you couldn't sell that stock, right?

A That is the difference I guess between banning and suspension at least in my mind. At some point in time hopefully it would not be suspended any more, but to answer your question, yes, until the suspension was lifted, you could not sell the security.

Q I think you testified that on the strength of the value of that Westec in your account, you had extra buying power and you had bought other securities, is that correct?

A As a general principle, yes, that is correct.

Q When the Westec was banned or suspended, you fell into margin deficit, is that correct?

A That is correct.

Q And Newburger, Loeb asked you to make up the margin deficit?

A Could you give me a time period for the question, Mr. Mandel?

Q Right after the suspension.

A I recall no communication with Newburger, Loeb right after the suspension.

Q When did you first hear from them?

A From Newburger, Loeb?

Q After the suspension about a problem created by the suspension.

A When did I hear from them. I had discussions or correspondence with Mr. Stern of Newburger, Loeb in May of 1969. What may or may not have happened of hearing from Newburger, Loeb from August 25, 1966 until May -- a different date has been used for the reactivation of trading, my date is May 15th so I will use my date of May 15, 1969, I don't recall any verbal conversation. I have nothing in my files in writing from Newburger, Loeb.

Q Did they keep sending you bills?

A I received monthly statements listing Westec as a long position and an increase in the debit position because of the accumulating interest.

Q It is your recollection that nobody from Newburger, Loeb asked you to pay up?

A That is my recollection.

Q Do you remember going down to a meeting at Newburger, Loeb to meet with Mr. Morris Newburger and Mr. Leo Stern and bringing a lawyer with you?

A As a matter of fact, I do, Mr. Ryan.

Q You do now?

A Mr. Ryan, but I don't remember the date.

Q That was within a few months after the suspension of trading?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I don't remember the date. I think I made that clear.

Q Was it during --

THE COURT: The question did not have to do with a period a few months after trading was suspended.

A Do I remember a meeting with those parties a few months after the trading was suspended, no, I do not. I remember meeting with them. I do not remember meeting with them a few months after the period when the trading was suspended.

Q What is your best estimate when that meeting was?

A I can't tell you.

Q You don't know whether it was '66 or '67?

A I cannot accurately answer that, no, I cannot.

Q Can you give us any timeframe at all?

A I am sorry, I can't. There were no minutes that we kept. There was nothing given back to me in writing that I ever had in my files or ever recall receiving from Newburger, Loeb. I recall a meeting with my attorney, Mr. Ryan.

Q And some people from Newburger?

A I recall Mr. Stern very well. If you say Mr. Newburger was there, I will trust you. I remember somebody from Newburger, Loeb being there other than Mr. Stern. What his name was, I don't recall.

Q What was the meeting about?

A The meeting was about the continued -- if we get to the time span, I assume it was about the continued suspension of Westec and the margin in my debit balance.

Q They were asking you to get some money?

A They were asking me what my resolution of it was.

Q What were you saying?

A That I was unable to comply with their request to satisfy the margin balance.

Q Do you remember their asking you to take out a life insurance policy on your father's life for collateral for that account?

MR. SHAW: Objection, your Honor, that is irrelevant and prejudicial.

MR. MANDEL: It is certainly relevant, your Honor. And I don't see how it could be prejudicial.

THE COURT: Overruled.

A Do I recall it, no, I do not recall it.

Q During 1966 --

MR. SHAW: Your Honor, I hate to do this, but could I interrupt and ask the jury to again be reminded that if a question is asked and the answer is no or I don't recall, the jury is to put the question out of their mind bcause the mere asking of the question does not establish the fact.

THE COURT: That is correct, it is only the answers to questions that are evidence.

Q Now, we are going back to the date, ~~did~~ you say May 15, 1969 --

THE COURT: 1969.

MR. MANDEL: No, I don't mean that date. I am confusing myself, your Honor.

Q Any time in 1966 did you say to Mr. Jordon, "Charlie or Mr. Jordon, you did something wrong, you churned me"?

A No.

Q Did you say anything to Newburger, Loeb at any time in 1966?

A No.

Q When you met with the people at Newburger, Loeb with your attorney, Mr. Ryan, did you or he say you were churned?

A Not that I recall, no.

Q In 1967 did you say to Charles Jordon or to anybody in Newburger, Loeb you were churned?

A No.

Q In 1968 did you say to anybody in Newburger, Loeb you were churned?

A Not to my recollection, no.

Q Now, on May 15, 1969, what happened?

A Assuming that we are all agreeing that that is the date when Westec reopened, Westec reopened.

Q And then what happened?

A Well, the stock opened and contrary to testimony that was given before, it opened at 11-1/4. Nothing happened.

Q Did you have any discussions then with Leo Stern about whether your Westec should be sold out?

A With Leo Stern, not to my recollection, no.

Q Did you have any discussions with any representative of Newburger, Loeb concerning whether your Westec should be sold out to cover part of the balance you owed?

A No.

Q There were no communications one way or the other?

A Not to my recollection.

Q Did you ask them to sell -- you didn't ask them and they didn't say anything to you?

A They were in violation. It was up to them --

MR. SHAW: Objection, your Honor. It is unresponsive and also confusing and I move to strike.

THE COURT: The answer is you didn't speak to them and they didn't speak to you on this subject.

THE WITNESS: Not to my recollection.

Q Did you have any knowledge at that time of a requirement of law requiring them to sell out that stock --

MR. SHAW: Objection, your Honor. The question of law. The question is going to be asked and the jury will be persuaded just by the question. It is clearly improper and I think I have the right to object.

A legal issue like this should be the subject of legal proof.

MR. MANDEL: It is a question --

THE COURT: How is his awareness of what I understand is involved here relevant to any issue?

MR. MANDEL: Your Honor, one of the --

THE COURT: Does it put a duty on him to do anything?

MR. MANDEL: No, but --

THE COURT: How is it relevant?

MR.MANDEL: But the adversaries have been trying to say that it was the fault of Gross & Company somehow that it wasn't sold out.

THE COURT: I am not persuaded that the question has any bearing upon the issues and I sustain the objection.

MR. MANDEL: All right.

Q Did you have any discussions with your attorneys after trading resumed in Westec?

A After treading resumed, yes, I did.

Q About whether you should approach Newburger, Loeb to sell the stock?

MR. SHAW: Objection, your Honor.

I withdraw the objection, your Honor. I was concerned about the question of privilege, but I think it is clear that there is no privilege any longer.

THE COURT: Okay.

A Would you repeat the question?

THE COURT: The privilege is his anyway. Go ahead.

(Record read.)

A No, I do not think I approached my attorney about a request to Newburger, Loeb to sell the stock.

Q So that if I understand your testimony correctly, until 1969 and after trading resumed there was no communication between you and Newburger, Loeb in any way except that you were getting statements every month?

A No, that is not my testimony.

Q All right, correct me.

A You refreshed my memory and said there was a meeting in that period of time.

Q Apart from that one meeting?

A I said that there was a letter, there was an exchange of correspondence between Mr. Stern and myself during that period of time.

Q Do you have that correspondence?

A I have given you nothing.

Q I am sorry, I misunderstood that. I am very anxious to have that correspondence.

MR. GRUTMAN: Your Honor --

MR. MANDEL: I withdraw that. I apologize. I do sincerely.

MR. GRUTMAN: Just don't do it.

A Yes, I do have the correspondence to which I was referring.

THE COURT: Mark it for identification.

MR. MANDEL: Will you produce it, please.

THE WITNESS: May I ask a question? This doesn't really involve the case, but it involves my records. I may sound paranoid about them, but these are my only copies.

THE COURT: We shall see to it that you get them back.

THE WITNESS: I don't know who is keeping a record of what is being given.

(Defendants' Exhibit E marked for identification.)

xx

MR. MANDEL: I would just like to offer this all as one exhibit and I would like to defer reading this until another occasion.

MR. SHAW: May I see it.

(Pause.)

MR. SHAW: No objection.

THE COURT: Received.

(Defendants' Exhibit E received in evidence.)

MR. MANDEL: May I go ahead in the meanwhile and we will have that marked in the meanwhile.

THE COURT: Yes.

Q Am I right that pursuant to the correspondence, which is being marked as Exhibit E, you took some of your Westec shares in '69 from Merrill Lynch and gave it to Newburger, Loeb to be applied in part against your deficit?

A That is correct.

Q In '69?

A Not to be applied against my deficit, but to be deposited in my account for whatever value they were worth.

Q You still did not claim you had been churned?

A In 1969?

Q At that point.

A At that point, no.

Q Now, did there come a time in 1969 when you did some business with Mr. Jordon?

A There came a time subsequent to Westec reopening that I did business. If you want me to look the date up, I shall.

Q Please look it up.

THE COURT: While he is looking, would you and Mr. Shaw come up?

(At the bench.)

THE COURT: Anybody ever define on this record what churning was?

MR. SHAW: We are going to have an expert.

THE COURT: Do they think he is a piece of butter? I am serious. I don't think this jury has the slightest idea of what churning is.

MR. MANDEL: That is a critical question here which you must define to the jury at the end of the case.

THE COURT: You have been asking him about whether he has ever made a statement about something.

MR. MANDEL: The reason for that is that--

THE COURT: I think it is a question of whether he claims he was improperly put in and out. I don't know that this jury has ever had any definition. The witness is using a word to describe a factual matter and nobody has described what the fact is.

MR. MANDEL: I will ask him in a different way.

MR. GRUTMAN: In order to be guided on calling witnesses, how much longer is Mr. Mandel going to be with this witness?

MR. MANDEL: I have this question and then maybe 10 or 15 minutes tomorrow morning.

THE COURT: Have you some redirect?

MR. SHAW: Yes.

MR. GRUTMAN: I haven't yet crossed. It is I hope, cross, your Honor.

THE COURT: To what extent has he touched upon your client?

MR. GRUTMAN: Any number of things that involve us as to the good faith of the churning claim and what the churning claim is all about and I don't know that --

THE COURT: All right.

MR. SHAW: The transfer.

THE COURT: All right, very good.

In any event, I do think that he should define what this gentleman means by churning.

MR. MANDEL: That would be prejudicial, your Honor, because his definition has no bearing. The complaint says churning and you will have to define that. Anybody else's use of the word is an improper conclusion.

What we must do is use other language.

THE COURT: Why do you use that word?

MR. MANDEL: Because he put in a churning claim.

THE COURT: The word churning is a word of art in the trade meaning a certain thing.

MR. MANDEL: No, it is a word of art in the law. I beg of you to consider this tonight. This is a fantastic and critical point.

THE COURT: Do you have any objection of he defines the word churning?

MR. GRUTMAN: I do.

MR. SHAW: I would as a legal conclusion. Mr. Mandel can be perfectly protected here by asking a correct question. When did you first claim or believe that anything wrong had been committed with respect to your account and we wouldn't have a layman's conclusion with respect to a question of law.

THE COURT: Do it that way then. You see, Messrs., Mr. Shaw, your colleague has walked away, but you let those questions be answered without objection so you permitte that word to go in without objection and you don't have much standing to complain about defining it.

MR. MANDEL: I don't think that is right, your Honor. Please don't close your mind about it.

THE COURT: All right.

MR. MANDEL: It is a little bit of reflection may help. The fact is that --

THE COURT: You mean to say if a fellow gets hurt on a grocery store floor, he can't be asked if he brought his action, when did you first decide to bring this action?

MR. SHAW: When did you first feel the pain.

MR. GRUTMAN: Just a moment, Mr. Mandel. Mr. Ryan, one of the other lawyers, will be available tomorrow morning at 11:00 o'clock.

THE COURT: I think if you all are reluctant to do it, you better ask him whether we can turn that around in some way so that the jury knows what you are talking about because you have given them a term.

MR. MANDEL: We discussed that before.

THE COURT: I know.

MR. MANDEL: Would your Honor do one thing, please, before making any decisions about this:

Read my requests to charge on churning.

MR. GRUTMAN: Could we have a copy of your requests to charge?

MR. MANDEL: No.

MR. GRUTMAN: You are required under the rules.

THE COURT: At an appropriate time when he exchanges his for yours.

I will defer on that.

MR. GRUTMAN: All right, Judge.

THE COURT: I think everybody has omitted this from this record without objection as a word of art.

MR. GRUTMAN: To which no content has yet been applied.

THE COURT: Go ahead.

MR. MANDEL: Can we do this tomorrow?

THE COURT: We will go about ten more minutes.

(In open court.)

BY MR. MANDEL:

MR. MANDEL: Mr. Reporter, do we have a pending question?

(Record read.)

A Yes. The dates?

Q Yes.

A From May 7, 1969 through August 29, 1969.

Q You did business with Mr. Jordon again?

A Yes, and I assume subsequently, but these dates are what I looked up.

Q When you started?

A Yes.

Q At that time Mr. Jordon was no longer with Gross & Company?

A That is correct.

Q Gross & Company was -- well, you don't know about that. Mr. Jordon was then in Scheinman, Hochstin & Trotter?

A Yes.

Q And at that time did you say to Mr. Jordon, "Charlie, you did something wrong at some point"?

A No, I did not.

Q Had you ever said to Mr. Jordon to this day, "Charlie, you did something wrong to me"?

A Mr. Jordon?

Q Yes.

MR. MANDEL: No further questions. May we suspend now until tomorrow?

MR. GRUTMAN: That is very nice. That is objected to, Judge.

MR. SHAW: He said ten more minutes, your Honor.

THECOURT: No, we are going to go until about a quarter to 5:00.

MR. MANDEL: You want me to go further?

THE COURT: You said you had no further questions.

MR. MANDEL: No, no, I made a mistake. Your

Honor, I have some other --

THE COURT: I see, your mistake is forgiven you. We are going to go for about ten more minutes.

MR. GRUTMAN: He was going to go so we could.

THE COURT: I am going to go for about another ten minutes with some attorney.

MR. MANDEL: That is fine, I will go right ahead.

Q Did there come a time, Mr. Buckley, when Newburger, Loeb began to press you very hard to pay your deficit?

A Yes.

Q Pardon?

A Yes.

Q When did that time come?

A The time that I recall was on November 20, 1970.

Q What happened then?

A I received a wire.

Q Will you produce that, please?

A Here is a copy of it. It is not the wire.

MR. MANDEL: May I mark it.

(Defendants' Exhibit F marked for identification.)

xx

MR.MANDEL: I would like to have it in evidence.

MR. SHAW: No objection.

(Defendants' Exhibit F received in

xx

evidence.)

MR. MANDEL: May I read this to the jury, your Honor?

THE COURT: You may.

(Mr. Mandel read from Defendants' Exhibit F in evidence to the jury.)

A Just to be precise, it is my impression that that wire is dated or stamped November 20th, not November 11th or whatever date you mentioned, so let me correct --

MR. SHAW: He said November 20th.

THE WITNESS: I said November 20th because that is what I thought the date was. No, I am in error. It is stamped November 12th. There is a date stamp in there. I guess the post office does it.

Q I was reading this.

A The date of their transmission. That is not the date I received it.

Q So you received Exhibit F on November 12th?

A Yes.

Q And then what happened?

A I subsequently received confirmation slips to the effect that the reference Tech-Sym had been sold in my wife's and my accounts.

Q Do you have copies of them?

A You have my confirmation slips.

Q I have those confirmation slips?

A Yes. Somebody better have a satchel -- excuse me.

THE COURT: What is the next question?

Q What happened after that?

A What happened with regard to what?

Q With regard to you and Newburger, Loeb and your deficit?

A I had been talking during 1970, whether after that or not, I would have to examine my records, about an arbitration proceeding between Newburger, Loeb and myself. I had been talking with my attorneys and certain documents were prepared.

Q When did you start talking to your attorneys?

A The documents, I believe, are dated, the culmination -- excuse me -- my first receipt -- the first receipt of any correspondence from the American Arbitration Association about this matter that I have in my files was August 17th, 1970.

I assume I talked to my attorneys for several months prior to that. I don't know the dates. This is the envelope with contents.

Q May I have that, please?

A Yes.

MR. MANDEL: I am going to offer this.

MR. SHAW: This is already in evidence I am pretty sure.

MR. MANDEL: What number is it?

MR. GRUTMAN: Absolutely it is?

Q Mr. Buckley, we may be a little bit out of sequence. I asked you what happened next and you gave me some answers. I wasn't alert enough --

MR. SHAW: Object, your Honor, to all this.

MR. GRUTMAN: Your Honor, please.

THE COURT: Yes, sustained.

Q Will you -- the fact is, is it not, Mr. Buckley, that you received a demand for arbitration --

A I will have to read it.

Q Just the date of it?

A Just the date of this letter saying unknown things?

Q Yes.

A August 17, 1970.

Q Before that I show you Plaintiffs' Exhibit 25. Have you ever seen that document?

A Yes, I have.

Q What is the date of that?

A June 10, 1970.

Q So that in actuality an arbitration was started against you by Newburger, Loeb & Company on or about June 10, 1970, is that correct?

A I am not an attorney like you are so start it again. I don't know an arbitration whether somebody goes against someone or whether there is a discussion between two parties or what.

I don't know that one part is a defendant, I don't know that.

Q But Exhibit F, which is November 11th --

A November 12th.

Q -- came after?

A Yes, after those two documents.

Q Yes.

MR. MANDEL: May I read this to the jury, your Honor, the arbitration demand?

MR. GRUTMAN: Judge, I object, this is the most naked vamping I have seen in years.

THE COURT: I don't understand that statement at all. What does that mean?

Naked vamping?

MR. GRUTMAN: Legal vamping. He is simply stalling to prevent the cross examination of Mr. Buckley by me and now he is reading these meaningless documents to the jury and simply taking up time. They have no relevancy.

THE COURT: I don't understand that at all. The witness gave him something as of November 1970 as being the next thing that happened. It turns out that something had happened earlier. I think this is relevant. He may read it.

MR. GRUTMAN: Judge, it is called freezing the ball.

THE COURT: No, he may read it. I do not regard your comment as having evidentiary merit.

MR. GRUTMAN: Very well, your Honor.

(Mr. Mandel read from Plaintiffs' Exhibit 25 in evidence to the jury.)

THE COURT: Do you need these details?

MR. MANDEL: One more thing. I will skip some unimportant material.

(Mr. Mandel continued reading from Plaintiffs' Exhibit 25 in evidence to the jury.)

Q Mr. Buckley, it is true, is it not, that at no time from 1966 until you received Plaintiffs' Exhibit 25 about June 10, 1970 you said to Jordon or anybody connected with Newburger, Loeb & Company that something wrong had been done by anybody in connection with your accounts?

A I believe that is true.

MR. MANDEL: No further questions.

THE COURT: What is your answer?

THE WITNESS: I believe that is true.

MR. MANDEL: No further questions.

THE COURT: We will recess now, ladies and gentlemen. We are going to resume at 10:00 o'clock tomorrow and sit until 1:00. You will be off tomorrow afternoon. Keep in mind it is not our usual 10:30. It is 10:00 o'clock in the morning.

Goodnight.

(Adjourned to June 20, 1976, 10:00 a.m.)

THE COURT: I will call the juror.

(Recess.)

(In open court, jury present.)

THE COURT: Good morning.

DAVID W. BUCKLEY, resumed the stand, having been previously duly sworn, and testified further as follows:

CROSS EXAMINATION

BY MR. GRUTMAN:

THE CLERK: You remain sworn, Mr. Buckley.

THE WITNESS: Yes, sir.

Q Mr. Buckley, other than the encounters that we have had with each other here in the courthouse, on how many occasions prior to meeting in court have you and I met each other?

THE COURT: Were you through with your cross examination?

MR.MANDEL: Yes.

THE COURT: You did not announce that yesterday.

MR. SHAW: I believe he did twice.

MR. MANDEL: I did.

MR. SHAW: I am sorry, I won't make any further statement during this examination.

THE COURT: All right. I missed that. All right, go ahead, sir.

A Once.

Q Was that occasion when I met you at Mr. Shaw's office?

A Yes, it was.

Q Was Mr. Shaw present during the whole of our interview at his office?

A No, he was not.

Q Did you and I have a chat?

A A chat?

Q Yes.

A Yes.

Q How long ago was that?

A I believe it was two weeks ago yesterday.

Q Mr. Buckley, the exhibit which has been received in evidence, the large one which has been appended to the blackboard, was that a document which you prepared for this case?

A For this case, no.

Q How long ago did you prepare that document?

A I believe that came up yesterday. It was obviously prepared as of December 15th. It is not marked as to the day I prepared it. I did not recall.

Q Do you recollect in what year you prepared it?

A That I did not know yesterday and do not know today.

Q Sir, did you prepare it for your own purposes?

A For my own and my attorney's purposes.

Q Does that chart show the paper loss which you sustained in the trades between '62 and '66?

A No, it does not.

Q Likewise, Mr. Buckley, does that chart reflect the amount of money which you paid in commissions to your broker?

A No, it does not.

Q The broker -- it does not?

A It does not isolate the commissions.

Q Very well.

The broker whom we are talking about is Charles Gross, is that correct?

MR. MANDEL: I object on the ground it is leading.

THE COURT: Yes, sustained.

MR. GRUTMAN: Your Honor, may I have an understanding.

Is this cross examination?

Mr. Shaw proposed the witness. Mr. Mandel crossed. I thought this was cross and for that reason I thought I would be entitled to some leading.

MR. MANDEL: Your Honor, I believe the rule is this: That technical considerations do not govern and it is within your Honor's discretion to decide whether the witness is really an adverse witness for cross or is really the witness of the party.

Now, I will go on record to state that Mr. Grutman said to me here two days ago, don't you talk to my witness, meaning Mr. Buckley, and after that Mr. Buckley --

THE COURT: I don't need to get into this. This is a simple objection to the question and on the grounds of form I am sustaining the objection.

MR.GRUTMAN: So I don't run afoul of your Honor's ruling, will you tell me am I cross examining as I think I am?

THE COURT: In certain areas you may be and in certain areas you may not be. That has nothing to do with my ruling. I am ruling merely on the form of the question.

MR. GRUTMAN: Very well.

Q Mr. Buckley, for the 1,110 transactions that are reported on that chart, were there commissions charged by the brokerage house which handled the transaction?

A Yes.

Q And the brokerage house with whom you placed the order, was that with Jordon?

A Yes, it was.

Q Mr. Jordon as a broker was employed by what brokerage house between '62 and '66?

A He was employed by, but I believed he was also a partner of Gross & Company.

Q Do you know, Mr. Buckley, what the approximate amount of the commissions were on the sales reflected on that exhibit?

A Yes, $75,000.

Q You paid those commissions whether you made a profit or a loss on the transaction?

A Certainly.

Q Do you recollect yesterday when Mr. Mandel was cross examining you some questions which were put to you about an awareness which you had that in the stock market and in trading you could make profits as well as losses? Do you remember that question?

A Yes, I do.

Q As well as the fact that stocks could go up or stocks could go down. Do you remember that question?

A Yes, I do.

Q Likewise, do you recall Mr. Mandel asking you whether you were aware that you had a right at any time to sell stocks in your account? Do you recollect Mr. Mandel putting that question to you?

A Yes, I do.

Q Now, I ask you, Mr. Buckley, to tell Judge Owen and the members of this jury whether during the period between 1962 and 1966 there was ever a time when you called up and spoke to Mr. Jordon and expressed an intention to sell a stock and the stock wasn't sold?

MR. MANDEL: I object. It is leading. I object to the form of the question on both grounds.

THE COURT: Well, let's come to the side bar.

(At the side bar.)

THE COURT: What are you after?

MR. GRUTMAN: I am after the Wichita conversation and I believe the door was opened. It is not ajar, it is wide open. He asked him several questions yesterday about his awareness that he had a right at any time to call up the broker to cancel the accounts and sell the stocks. I intend in this examination to demonstrate that there was an instance when he called up Jordon, when he told Jordon that he wanted to sell a stock and that the stock involved was Westec and the stock that he wanted sold was to be sold out and it wasn't sold out.

BY MR. GRUTMAN:

Q Mr. Buckley, in 1966 did you own any shares of Westec?

A Yes, I did.

Q Approximately how many shares of Westec had you bought through Mr. Jordon?

A At any time?

Q No, at that time, how many shares were you holding in 1966 which you had bought through Mr. Jordon of Gross & Company?

A In August of 1966 I was holding 11,300 shares.

Q That was at the Gross & Company account with Newburger, Loeb?

A That is correct.

Q In addition to the 11,300 shares which you had in the Gross & Company account with Newburger, Loeb, did you also own any other shares of Westec held in an account with a different brokerage house?

A Yes, I did.

Q Was that with Merrill Lynch?

A Yes, it was.

Q Approximately how many shares at this period of time did you own in the Merrill Lynch account?

A It wasn't approximate. It will be definite.

There were 3,000 shares owned in early August. There were 2,500 shares owned in late August.

Q At Merrill Lynch?

A Yes.

Q Before the month of August, had you met the president of Westec?

A Yes, I had.

Q Who had brought you to meet the president of Westec?

A Mr. Jordon.

Q Was that at the Plaza Hotel meeting to which you referred?

A Yes, it was.

Q Subsequently, did the Westec Company issue its annual report on time?

THE COURT: I believe we had testimony as to this.

MR. GRUTMAN: It was late, fine.

Q Were you concerned when the Westec Company did not issue its annual report in timely fashion?

A Yes.

Q Did you discuss that with several of the people whom you say you knew in Wall Street other than Mr. Jordon?

A One.

Q Who was that?

A Mr. Clancy.

Q Mr. Clancy is with the Shannon firm?

A He was with Brokaw, Shannon & Clancy.

Q Did you get some adverse opinion from him?

A Yes, I did.

Q Who gave you the annual report?

A I received it in the mail.

Q Did you give that report to Mr. Clancy?

A Not precise, I received it in the mail. I was not a shareholder of record. The shareholders of record were the two brokerage firms so I received it by way of the brokerage firm.

Q After you received this late annual report, did you submit that to Mr. Clancy for his views about it?

A Yes, I did.

Q Did you discuss with Mr. Clancy what his views were?

A Yes, I did.

Q After speaking with Mr. Clancy about what his views were concerning the financial vitality or soundness of Westec, what was your feeling about Westec?

A That it smelled to high heaven.

Q Did Clancy tell you that?

A Yes, he did.

Q What was the approximate selling price of the Westec shares at the time that Mr. Clancy told you that the financial statement smelled to high heaven?

A Either in the high 50s or the early 60s, somewhere in there.

Q That means numbers, in the 50s to 60 range?

A $50 or $60 a share.

Q Could you tell me approximately when it was that Mr. Clancy gave you this opinion about Westec?

A Yes, I believe, not even to the best of my recollection, I am almost positive it was July of 1966.

Q Sometime around July or thereafter did you have occasion to travel to Wichita, Kansas?

A Yes, I did.

Q Did you place a telephone call in Wichita, Kansas to your broker, Charles Jordon, of Gross & Company?

A Yes, I did.

Q Did you discuss with Mr. Jordon the Westec stock which you had?

A Yes, I did.

Q Did you express an intention to Mr. Jordon --

MR. MANDEL: I object.

THE COURT: Sustained.

Q What did you tell Mr. Jordon about what you wanted to do?

MR. MANDEL: I object.

THE COURT: Sustained.

Q Did you discuss --

THE COURT: You may ask him what he said to Mr. Jordon and what Mr. Jordon said to him.

MR. GRUTMAN: Is that the way you want me to ask the question?

THE COURT: Yes.

MR. GRUTMAN: Fine.

Q Will you tell us what you said to Mr. Jordon about the stock, this Westec stock, and tell us what Mr. Jordon then told you?

A I related to Mr. Jordon, perhaps not for the first time, I don't recall, but I either repeated or relayed to him my concern with Westec and my desire to sell.

Q Did you --

THE COURT: No, sir.

MR. GRUTMAN: May I interrupt?

THE COURT: No, we are going to have the conversation.

Q Was it a desire to sell the whole or part?

THE COURT: Please, Mr. Grutman, you have asked him the question. Let's exhaust his recollection of the conversation.

Q Very well, a desire to sell?

A Yes.

THE COURT: May we have the answer read back as far as it went.

(Record read.)

THE COURT: What else did you and he say?

THE WITNESS: The additional exchange went something along this line and I, for emphasis, I am very precise in my mind as to what I am about to say.

Mr. Jordon asked me why I was concerned. I repeated the concern that had been expressed to me and with which in my abilities or lack of them at that time agreed with that the operating results, the profit and loss statement and the balance sheet of Westec, were not sound and might even be misleading.

I explained to Mr. Jordon the fact that Westec had evidently reported as 1965 income one time sale of oil leases and although I wasn't too knowledgeable about this, Mr. Clancy said that Westec had argued that the sale of oil leases was a matter of their ongoing business, but in his opinion it could not be ongoing at least for very long because they were going to run out of the oil leases and, therefore, could not sell them at some future period of time.

The net of the conversation being both with Mr. Clancy and myself and with me to Mr. Jordon from Wichita that Westec was recording in 1965 as 1965 operating profits what might be termed as one-time profits and not possibly recurring in 1966, 1967, 1968, et cetera.

In my opinion and in Mr. Clancy's a misleading --

THE COURT: No, just the conversation that you had with Mr. Jordon.

THE WITNESS: This is part of my conversation from Wichita with Mr. Jordon, your Honor.

THE COURT: You told him what you discussed with Mr. Clancy?

THE WITNESS: Yes.

THE COURT: Go ahead.

A -- in some detail and that I would like to sell my Westec stocks. I had concluded that. To reenforce my conclusion I repeated -- I told Mr. Jordon that of the 3,000 shares I held at Merrill Lynch, I had already sold 500 shares and was also going to sell out that position. I had already sold the 500 shares of Westec.

Mr. Jordon said to me that selling the 11,300 that I held through him and selling the other 2,500 that

I at that time held through Merrill Lynch, a total of 13,800 shares, would have a severely depressing effect on the price of Westec stock in the light of its daily activity.

I said to him, "That is too bad, I have decided to sell. I would like to sell."

Mr. Jordon said to me, 'here may be information that you are not aware of. You are aware of the fact that there are mining, I believe, copper findings or explorations in Central or South America, I believe Chile, but I am vague on that, that Westec is involved in and that he had information just that day from the publicity director of Westec, a lady whose first name -- I had also met at the Plaza and who Mr. Jordon had mentioned previously as having been in contact with Mr. Jordon personally on the telephone -- whose first name was Betty. Her last name starts with an "A". It ends with an "OU," I don't remember the middle. She is a large blond woman, I remember her very distinctly from the Plaza.

I said to Mr. Jordon, "Do you consider this information accurate?"

He said, "Yes, I do," and in light of his statement that the information was meaning to be accurate and in light of his concurrent statement that a sale of 13,800 shares of my Westec stock at one point in time might be severely depressing to the market, in light of those two facts I changed my mind and told Mr. Jordon not to sell.

Q Mr. Buckley, when you had the conversation with Mr. Jordon and he told you that the sale of the 11,300 shares that you contemplated being sold would have a depressing effect on the market or rather 13,800 shares would have a depressing effect on the market, did Mr. Jordon tell you how many shares of Westec he held for himself?

A No, he did not.

Q Did he tell you that he owned 1,000 shares of Westec?

MR. MANDEL: Excuse me, I object on the ground that these questions are leading, irrelevant and prejudicial.

The question at best should be was there any discussion about such holdings.

THE COURT: Yes, I sustain the objection. Strike the question.

Q Did you ever learn, Mr. Buckley, whether or not Mr. Jordon held shares of Westec himself?

THE COURT: No, that is irrelevant to the issues here.

MR. GRUTMAN: Motive, your Honor?

THE COURT: No, whether he learned, his state of mind, that is not relevant to the issues.

MR. GRUTMAN: At the time he had this conversation with him and he may have relied on him, was he told this fact?

THE COURT: Either way you come at it, your question is irrelevant. His state of mind as of some later point is irrelevant. The question should be phrased whether there was anything said about any holdings, if any, of Mr. Jordon in that conversation.

MR. GRUTMAN: I will abide by that.

Q Mr. Buckley, will you tell us what this information was that Mr. Jordon told you that he had that he had gotten from the public relations lady. What was it?

A I believe I just stated it.

Q Would you tell me again, I may have missed it.

THE COURT: No, I sustain it. The objection is sustained.

THE WITNESS: I didn't hear the objection.

MR. GRUTMAN: My colleagues have helped me.

Q Mr. Buckley, to your knowledge was the copper mine strike that Mr. Jordon told you about something which was correct or incorrect?

A Just before I give you an answer, I didn't use the word "strike." I believe I used the word "exploration."

Q Exploration.

Did the copper mine ever materialize?

MR. MANDEL: I object.

THE COURT: Sustained.

Q Do you have a recollection of Mr. Jordon telling you anything else as a reason for not selling the 13,000 shares of Westec that you requested other than the copper exploration and the depressing effect which such a block of stock would have on the market were it to be sold?

MR. MANDEL: I object to the form of the question.

THE COURT: Overruled.

A Just to correct the question, it was not 13,000 shares. It was 11,300 with Mr. Jordon.

Q All right.

A Let me pause for a moment, if I may.

Q Surely.

(Pause.)

A (Continuing) The answer would have to be no, Mr. Grutman.

MR. GRUTMAN: May I have Mr. Buckley's deposition, please.

Q Mr. Buckley, do you recollect that you were examined before trial in this case, that is your deposition was taken on April 18, 19 --

A I remember a deposition, yes.

Q It was on June 11, 1971.

MR. MANDEL: One moment, please. Your Honor, I believe that Mr. Grutman is not entitled to question Mr. Buckley on his deposition except to clarify portions of the deposition that I questioned on yesterday.

THE COURT: Overruled.

Q Do you remember in the deposition being asked the following questions beginning at page 65, line 21. I will refresh your recollection, Mr. Buckley.

THE COURT: Any objection to the witness following alone with a copy?

MR. GRUTMAN: I will try and get a copy for him.

THE COURT: He has one.

Go ahead.

Q "So he, "the antecedent of which is Jordon, "thought Westec should not be sold and that is where you think he committed some wrong against you, is that right?

"A That is where he did what?

"Q Committed some wrong against you.

"A Where his counsel was wrong, yes."

And the question goes on -- I am sorry, I go back to page 63.

Beginning where you say at line 23 --

MR. MANDEL: Excuse me, your Honor, may I note a continuing objection to the use of Mr. Buckley's deposition by a party to whom he is not adverse but by somebody in the nature of his own counsel.

MR. SHAW: Objection to that statement.

MR. GRUTMAN: Objection.

THE COURT: May I point out to your Honor that the claim made by the plaintiff here is a claim assigned by this witness so that they are in private interest.

THE COURT: I will overrule that objection.

Q It begins at line 23 on page 63 where you stated, Mr. Buckley, in your deposition:

"I very distinctly recall I was in Wichita, Kansas in August of that year. I also had a smaller amount of Westec stock at Merrill Lynch, 3,000 shares to be precise. I instructed them to sell 500 share of it based on what this man's comments were and also based on some of the fluctuations in the stock that continued to go on, these being more on the down side, as I recall, in the 60s down to the 40s. When I called Mr. Jordon from Wichita, Kansas and asked him what the latest information was and he said he just talked to the PR gal down in Wichita and the information on the copper mine down in South America, I believe Chile, was very, very favorable and the initial investigations were very favorable and that in his opinion somebody was trying to drive the price down before this information came out such that they could get it at a lower price and definitely not to sell."

Now that I have read to you the answer which you gave on the deposition in 1971, does that refresh your recollection as to another reason that Mr. Jordon gave to you when he suggested that you not sell the stock that you told him you wanted to sell?

A Yes, it does.

MR. GRUTMAN: Your Honor, I notice that a member of the Bar, whom I have asked the Court to permit me to call out of turn, is here, Mr. Ryan of the Webster, Sheffield firm, and I would request that Mr. Buckley be permitted to stand down and I examine Mr. Ryan.

THE COURT: Very good.

THE WITNESS: Am I standing down until Monday?

MR. GRUTMAN: No, just for a short while, I hope.

THE WITNESS: I hope not until Monday.

(Witness temporarily excused.)

JAMES V. RYAN, called as a witness by Mr. Grutman, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Ryan, are you an attorney duly licensed to practice law in the State of New York, a member of the Bar in good standing?

A Yes, I am.

Q Would you tell Judge Owen and the members of this jury with what law firm you are associated?

A Webster, Sheffield, Fleischmann, Hitchcock & Brookfield.

Q Are you a partner in that law firm?

A Yes, I am.

Q Is that a general practice firm?

A Yes, it is.

Q What is the size of your firm, Mr. Ryan?

A We have approximately 55 or so lawyers.

Q For what length of time have you been affiliated with your firm?

A Ten years, this firm.

Q Would you briefly give to us an outline of your curriculum vitae, the law school you attended, what post-graduate legal education you have had including, if you will, the courts to which you are admitted, any learned societies or associations with which you are connected, any publications with which you have been involved, any honors or professional activities?

MR. MANDEL: Your Honor, is Mr. Ryan being proffered as an expert witness?

MR. GRUTMAN: In a certain sense, yes, on the churning claim.

MR. MANDEL: May we have a meeting at the side bar?

THE COURT: Let's get down to the question before we do that. Go ahead.

A I graduated from Fordham University School of Law in 1951. I was admitted to the Bar of the State of New York in September 1951. In August of 1951 I joined the Justice Department in Washington and I was in Washington with the Justice Department until December 1951 when I came back to New York and joined the staff of the United States Attorney of the Southern District of New York.

I stayed with the United States Attorney's office until January or February of 1954. I then went into private practice.

I joined a firm here in New York and I became a member of that firm in 1957 and in 1957 that firm was dissolved and I joined my present firm, Webster, Sheffield, and have been there ever since.

I am a member of the Federal Bar here in New York and the Courts of Appeals in the First, Second, Third, Fourth and the Supreme Court.

Q First, Second, Third and Fourth Circuits?

A Circuits, yes, I think the Fifth, too.

I am also admitted to the United States Supreme Court.

I am a member of the American College of Trial Lawyers and that is about it.

Q Mr. Ryan, I gather that you are a trial lawyer?

A I guess you would say that, yes. I spend the bulk of my time in litigated matters or trying to settle litigated matters.

Q When we talk about litigated matters as lawyers, are we talking about controversies and disputes of all

all kinds?

A That is correct.

Q Including some which are tried in formal courts as well as before other tribunals?

A Correct.

Q Does that also include arbitrations?

A That is correct.

Q Sometime prior to 1969 do you know whether or not a man by the name of David Buckley had been a client of your law firm?

A He had.

Q Was his father a client of your law firm?

A I don't believe so. He could possibly have been, but I don't think so.

Q Was he a client who was originated in the firm through you or through one of your other partners?

A Through one of my other partners.

Q Did there come some time when you, as a member of your firm and as a trial lawyer, were consulted in a professional capacity to handle a matter on behalf of David Buckley?

A That is correct, yes.

Q Do you have a recollection, Mr. Ryan, of when that was?

A I have gone back into my file and I can't fix the exact date, but it was sometime in early September 1966 was the first time I met Mr. Buckley.

Q Do you have a recollection of what the subject matter was in which you were connected with Mr. Buckley on a professional relationship basis?

A Yes, I do.

Q What was that, Mr. Ryan?

A I was called, my partner Henry Smith who had done some personal work for Mr. Buckley, called me into his office one afternoon and Mr. Buckley was there and he in a few minutes gave me a summary of Mr. Buckley's predicament at that time.

That was after Westec Corporation had filed for some sort of a bankruptcy proceeding. I am not sure whether it was a Chapter X or XI, whatever it was, and Mr. Buckley had a debit balance in his margin account at the brokerage firm of Newburger, Loeb which was secured by I believe it was about 11,000 shares of Westec stock. Westec stocks'trading had been suspended, as I recall, a couple of weeks before, and, of course, under the margin rules, Regulation T, when a stock is suspended from trading, it no longer can be used as collateral and under the regulations, Mr. Buckley was waiting for a formal margin call which would have required him to pay.

Q We lawyers talk our own jargon. I am going to ask you when we talk about certain terms now that you explain those terms in shirt sleeves language so that lay people can understand what these things are, particularly as they relate to financial matters.

This conversation in which you met Mr. Buckley for the first time you say took place sometime in 1966, is that correct?

A That is my recollection as refreshed from my files. I have been unable to get my personal diary which may reflect a more fixed date, but I would say it is early September of 1966.

Q You made reference to a thing called Regulation T. Whose regulation is that?

A That is the Federal Reserve Board.

Q Does that control the possible --

THE COURT: I will sustain the objection.

Q Will you tell us what it controls?

A Well, the Regulation T controls the extension of credit by lending institutions of the Federal Reserve System where securities are traded on one of the stock exchanges are used as collateral.

Q Collateral means what?

A Security for the loan.

In other words, they borrow against the security up to certain percentages of the value.

Q You mean you hock the security for a loan?

A That is correct.

Q Okay. Regulation T you said had applicability when Westec was suspended. What was the effect on the securities which had been hocked or pledged for loan?

A They could no longer -- under the Federal Reserve Regulations, they no longer can be used as collateral for the loan.

Q You said when Mr. Buckley met with you in Mr. Smith's office he was expecting a margin call. Do you know whether one had been received yet from Newburger, Loeb?

A My recollection is that there might have been an oral call from somebody at Newburger, Loeb, but there had been no formal notice. My file indicates there was a formal notice sent later than our meeting.

Q Between 1966 and sometime in 1970 did you have occasion to meet with Mr. Buckley and to discuss what you described as his predicament on this Westec stock?

A Oh, a number of times.

Q Were these meetings held at your office?

A Well, some were held in my office. I seem to recall also meeting at Newburger, Loeb certainly by myself and I think Mr. Buckley might have been there on at least one occasion.

Q Who did you meet with at Newburger, Loeb?

A A Mr. Leo Stern.

MR. MANDEL: Excuse me, may we fix a date, please.

MR. GRUTMAN: We will try, Mr. Mandel.

Q The best you can, Mr. Ryan.

A Well, there were several meetings which took place between, I would say, sometime in the fall of 1966 when I had my first meeting with Mr. Stern and Mr. Newburger and then there were a series of meetings I would say, oh, every six months or nine months I would get a call from Mr. Stern, "What are we going to do?"

And I would go down and we would discuss the situation and then I would come back and then we met again on an occasion in I believe it was early 1970, this was just prior to the time when Westec's trading was resumed.

Q The meetings that you had in 1966, '67, '68 or

'69 at these six month intervals, what was it that Newburger, Loeb wanted?

A To be paid.

Q About how much did Newburger, Loeb say it was looking for from Mr. Buckley?

A Well, I don't know the exact number. My recollection is that it was -- the actual loan was somewhere around 225,000 or so dollars and then, of course, interest was accruing during this period of time.

Q What is your best recollection, Mr. Ryan, as to what the interest factor added to the principal came to by around 1969 or 1970?

A Almost $100,000 is my recollection.

Q So it would be around $300,000 or $400,000?

A No, I think it was about 300. Somewhere about three and a quarter or -- $325,000 or $350,000, something like that.

Q The money that Newburger, Loeb was looking for, was that money real money that it had loaned to Mr. Buckley to buy securities?

A Yes, I would assume so, yes.

Q Did they claim they were out-of-pocket the money that they had loaned?

A That is correct.

Q And in the meetings did you try to hold them off from '66 through '69?

A Yes.

Q And you were fairly successful in that, were you not, Mr. Ryan?

A It wasn't me.

Q There was no lawsuit that had been commenced up to that time, correct?

A That is correct.

Q Did you explain to Newburger, Loeb what the financial circumstances and capabilities of your client was?

A That is correct.

Q Did he have the capability to pay Newburger, Loeb back the money?

A No.

Q Were those his financial circumstances in 1966, '67, '68 and '69?

A That is co-rect.

Q Sometime around 1969 or 1970 do you recollect that a proceeding was begun in arbitration brought by Newburger, Loeb & Company against David and Mary Buckley?

A That is correct.

Q Now, an arbitration, would you tell us what kind of a proceeding that is, Mr. Ryan?

A An arbitration is an arbitration. It is conducted by, this particular one was conducted under the auspices of the American Arbitration Association and it is a form of a litigation only it is not in a courtroom. It is in a non-- it is a quasi-judicial atmosphere. There are arbitrators, usually three, and they hear the testimony of the witnesses and resolve the disputes.

It is done by agreement of the parties and rules of evidence are not quite as formal as they are before a trial judge and it is a way of resolving disputes on a more, excuse the expression, businesslike basis.

Q Mr. --

THE COURT: I am not sure I will accept that.

Q Was there some reason that you are aware of as to why the dispute was laid in that forum rather than in a formal court such as this one?

A I believe that under the agreement opening up the accounts a customer agrees to submit such disputes to arbitration, which is the written contract which is required by New York State law.

Q When the arbitration was begun, was there a formal piece of paper which was served on your client, David Buckley, which commenced that litigation?

A I seem to recall I accepted service of one, but I could be wrong.

Q I show you Exhibit 25. Looking at that document does that refresh your recollection that that was the formal process which commenced the litigation in arbitration between Newburger, Loeb & Company and David Buckley?

A This looks like it, yes. I would say yes.

Q Now, under the practices that prevailed in the more businesslike arbitration, do they follow the practice of courts and require responsive pleadings?

A That is correct.

Q Did your law firm investigate the facts concerning Mr. Buckley's obligation to Newburger, Loeb?

A Oh, most certainly.

Q Did you go over whatever documents Mr. Buckley could provide you with as to the transactions and the like?

A Yes.

Q And did you examine these documents that were supplied to you by your client and others which you may have obtained for the purposes of framing a responsive pleading to the demand which Newburger, Loeb made in commencing the arbitration?

A Well, yes, the documents were a part of the claim, but it wasn't the total claim by any means.

Q On the basis of your review, did you analyze the facts and formulate a legal position?

MR. MANDEL: I object to the leading question.

THE COURT: I sustain the objection.

Q Did you come to a conclusion as to whether there were any defenses which could be interposed on Mr. Buckley and Mrs. Buckley's behalf to the claim made by Newburger, Loeb?

MR. MANDEL: I object.

THE COURT: I sustain the objection.

Q Did you come to an opinion --

THE COURT: I will sustain an objection to that.

Q I show you a document received in evidence as Exhibit 28 and ask you to look at it and see whether you recognize that to be the answer which was interposed by your law firm on behalf of your clients in the arbitration proceeding between Newburger, Loeb and the Buckleys?

A Yes, this is a copy of our answer, but there is some writing on page 4 which is not mine.

Q Apart from the marginalia, the actual typewritten document, all of which is in evidence, that is the document which your office prepared?

A That is correct.

Q Before coming to court to testify today, Mr. Ryan, was there an occasion when you and I met at your office at my request and your willingness to see me?

A That is correct.

Q Did you review the documents in your file?

A Yes, I did.

Q Is the document which I have just handed to you or a counterpart of the one of the documents which you reviewed?

A Oh, yes.

Q Are you familiar with the substance of that document?

A Yes, I am.

Q In the answer which was interposed by the firm of Webster, Sheffield, Fleischmann, Hitchcock & Brookfield on behalf of David and Mary Buckley, did you assert a claim for churning?

MR. MANDEL: I object.

THE COURT: Is the exhibit in evidence?

MR. GRUTMAN: Yes, it is.

THE COURT: It speaks for itself. Objection sustained.

MR. GRUTMAN: All right.

MR. GRUTMAN: Fine, very well.

THE COURT: If you do that on that basis. I am not so sure you are right on Mr. Mandel's position because I think some instruction might be in order to have the jury be aware that this is his definition of it of his use of it -- I will charge the law applicable to churning at an appropriate time in the case.

MR. GRUTMAN: Fine, your Honor.

(In open court.)

BY MR. GRUTMAN:

Q Mr. Ryan, would you tell the jury what you meant when you used the word "churning" in this pleading?

MR. MANDEL: I object.

THE COURT: Yes, overruled.

A Well, churning has a meaning on the broker's business --

THE COURT: Mr. Ryan, the limits to which I am going to permit you to testify on this issue is to your understanding of the meaning of that word in your pleading and I want to say at this point, ladies and gentlemen, I am going to permit Mr. Ryan, as the preparer of this pleading, to explain what he understood that word to mean, the word "churning" to mean in that pleading.

At an appropriate time in this case I will charge you on the law that you shall apply to determine whether or not there has been, in fact, a charge here sustained as to churning. You will apply the law that I will give you to make the determination as to whether there has been churning or not.

Mr. Ryan's testimony goes to a question of what he understood that word to mean in the pleading that he prepared.

All right.

A I intended a course of conduct where a securities broker in relationship to his customer executed transactions in securities the prime purpose of which was to generate brokerage commissions for the broker rather than accomplish the investment objectives of the customer.

Q And that defense was asserted on behalf of your client in this pleading, is that correct?

A It wasn't a defense. It was a counterclaim.

Q A counterclaim. When you asserted that counterclaim, did you assert it in good faith?

A Most assuredly.

MR. MANDEL: I object to that.

THE COURT: No, overruled. I will allow it.

Q Your law firm is located at Rockefeller Plaza, is that correct?

A That is correct.

Q When you or the litigating partner in your law firm prepared these papers or pleadings, had you ever heard of the law firm of Finley, Kumble, Underberg, Persky & Roth or any of its successor designations now presently known as Finley, Kumble, Heine, Underberg & Grutman?

A I don't believe I ever had heard of the firm.

Q Do I take it, then, Mr. Ryan, that this responsive pleading, which is Exhibit 28 in evidence in this case, was prepared solely by your law firm exercising its independent abilities and judgment?

A Oh, yes, sir.

Q Was there any collusion between your law firm and Finley, Kumble?

A Of course not.

Q Or any cooperation or consultation?

THE COURT: He didn't know of them so those questions have no foundation.

Sustained.

Q You never even heard of Finley, Kumble, I take it. It is all right.

A I don't believe I had.

MR. GRUTMAN: It is all right.

Q Mr. Ryan, sometime in 1970 you did come to know the Finley, Kumble law firm and some of its partners and associates,, did you not?

A To be perfectly frank, I don't ever recall hearing of your law firm until I was called regarding this case.

Q Did you have a lawyer in your law firm by the name of Lee Cook?

A Oh, yes.

Q Was Mr. Cook an associate who worked in the Litigation Department?

A Yes, sir.

Q Did you have anything to do, Mr. Ryan, with the negotiation of the settlement that was reached between Newburger, Loeb and David Buckley?

A Yes, sir.

Q Did you participate in that negotiation?

A Oh, yes, sir.

Q In the negotiations was the claim being urged on behalf of Newburger, Loeb that Buckley pay up $300,000, approximately?

A Well, they put in a demand for arbitration for the 300 odd thousand dollars.

Q That is the amount they claimed they lost?

A That is correct.

Q Did you tell the law firms which represented Newburger, Loeb of what the actual financial capability of David Buckley was to respond in damages?

A I don't recall there were law firms. My recollection is that there was only one law firm that I had any discussions with involving this claim up to the point of the settlement.

Q Fine, up to the point of the settlement, was that law firm Golenbock & Barell?

A I believe that is correct.

Q Did you actually negotiate the settlement of did Mr. Cook negotiate the settlement that was made where Finley, Kumble acted on behalf of Newburger, Loeb?

A No, that was me.

Q It was you, all right. I can tell you it was we that represented Newburger, Loeb. I show you Exhibit 28 in evidence, which is the stipulation of settlement.

Have you ever seen that before?

A Yes, I have. I must say I didn't notice that it was your firm. Frankly, let me put it this way, I don't ever recall seeing that document until I just looked my file over recently. I am sure Mr. Cook showed that to me before he signed it.

Q It was signed by Mr. Leland Cook on behalf of your law firm and by Mrs. Lenore D. Kalmus, one of the associates of our law firm on behalf of our law firm and for our client.

In the course of the negotiations besides Leo Stern and Morris Newburger, did you ever meet with any other principals of Newburger, Loeb or of Gross & Company?

A I recall at least one or possibly two of the very early meetings, this is going back into '66 and '67, that I met I believe it was Mr. Jordon.

Q Mr. Charles Jordon of Gross & Company, is that name familiar to you?

A I believe it was Mr. Jordon.

Q Yes.

A I don't recall meeting any other principal of Newburger, Loeb other than Mr. Stern and Mr. Newburger and Mr. Jordon.

Q Mr. Ryan, in the course of these negotiations idd you ever suggest to the people on the other side that David Buckley might go bankrupt?

A Oh, yes.

Q Was that one of your tactical arguments in trying to work out a settlement?

A Well, I don't know whether I would characterize it as tactical or not. It was the fact.

Q He didn't have the money and he would go into Chapter something, right?

A He would go into straight bankruptcy.

Q And in the negotiations that you had did you assert the fact that you thought the account was churned?

A Oh, yes.

Q And did you also assert --

MR. MANDEL: One moment, please, may we fix a time?

THE COURT: Yes, surely.

A This occurred -- my recollection is that Westec stock reopened in 1970 and I would say that about six months before it reopened, approximately, I met again with Mr. Stern and I am not sure that Mr. Newburger was there. It seems to me it was only Mr. Stern and I at that point in time raised with Mr. Stern not only the claim which you characterize as churning, but also the claim regarding the investment advice furnished by Mr. -- by Gross & Company to my client.

I do not recall whether I had any prior discussions with Newburger, Loeb or any of its representatives prior to that six months or so point.

Q What was this investment advice that you were referring to that you criticized?

A This was the basis of the second counterclaim.

Q What was that?

A The claim that Gross & Company breached its responsibilities --

Q Here it is.

A -- to Mr. Buckley in dissuading him, let me put it that way, from liquidating his position in Westec prior to the bankruptcy.

MR. GRUTMAN: May I have just a moment?

(Pause.)

MR. GRUTMAN: Your Honor, may I refer to this exhibit which is in evidence?

Q Referring to paragraph 4-A of the second counterclaim during the period April to August '66.

"Respondents dealt, conferred and placed their order with a registered representative of Gross & Company, said representative gave poor investment advice to respondents in that he advised respondents against selling their holdings in Westec despite unfavorable rumors and publicity and a steady decline in the value of Westec stock on the American Stock Exchange. Said representative's advice was based on inside information to which he was privy, which he knew or had reason to know as a registered representative was unreasonable. This information contradicted the aforementioned general market trend in Westec and the unfavorable publicity to which Westec had been subject at that time."

Is that the claim that you are referring to?

A That is correct.

Q On the basis of that claim or counterclaim did you seek affirmative relief on Mr. Buckley's behalf against Newburger, Loeb?

A There was a counterclaim.

Q For $458,000?

A Yes, sir.

Q When you asserted that counterclaim, did you assert that in good faith?

THE COURT: Wait a minute. I am going to sustain that objection. I should have sustained the earlier objection. The answer popped out before I could rule on it. I am going to reverse myself and strike the answer earlier for no other reason than this is within the jury's province to determine and, therefore, I think it is inappropriate to take that answer.

I strike the answer with regard to the earlier claim, which I will make more specific at a later time.

Q Did you, on behalf of the Buckley's agree to pay $50,000 in settlement of the claim brought by Newburger, Loeb?

A That is correct.

Q To do that did you participate in negotiations at arm's length?

A That is correct, but there was other consideration

Q What were the other considerations?

A We released our claims.

Q In addition was the Buckley claim against Newburger, Loeb assigned by Buckley to Newburger, Loeb?

A Yes, sir.

Q As a lawyer of as many years' standing and I think it is 20 or more, nearly 25, Mr. Ryan, have you ever had instances in your experience where cases have been settled and where part of the consideration of the settlement is the assignment of a claim?

A Oh, most certainly.

Q Is that considered a legal common place?

A Well, it happens in all negligence cases involving damages.

Q Does it also happen in commercial cases?

A Oh, I have seen it in commercial cases, yes.

Q You saw it in this case, correct?

A We agreed to it.

Q At the time that you agreed to it were you acting just on behalf of the Buckleys?

A Yes.

Q You had no arrangement with Finley, Kumble or any conflict of interest, is that correct?

A Absolutely not.

Q In the course of the investigations that you made on behalf of your client, did you ever ascertain what Mr. Jordon of Gross & Company's personal position was in Westec stock at the time that he, as you put it, dissuaded --

THE COURT: The objection is sustained. It will be hearsay in any event.

MR. GRUTMAN: I beg your pardon.

Q Did you know what Mr. Jordon's position in Westec was at the time that Mr. Buckley spoke to him about selling?

Is that question unclear, Mr. Ryan?

A Read it back, please.

MR. GRUTMAN: Strike it, please, and I will rephrase it.

Q During the course of your representation of Mr. Buckley and while your law firm prepared the counterclaims which it did in the litigation, did you ever learn what whether it is a good claim.

I am not going to permit it. Let's not argue it.

MR. SHAW: There is a counter -- if there is a counterclaim for abusive process in bringing that action, the issue before the jury is not only the merits of the action, but the good faith in the bringing of the action and that is the position that Mr. Mandel has created. That is not an issue of our making.

THE COURT: I have ruled. All right.

Now, Mr. Mandel, I assume you did not want me to highlight what I have stricken by repeating it.

MR. MANDEL: No, it is unnecessary.

THE COURT: All right, bring in the jury.

(Jury present.)

THE COURT: Mr. Mandel, are you ready?

MR. MANDEL: Yes.

I am sorry, I didn't realize the jury was here.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Ryan, I would like to go back to your first conversation with the representatives of Newburger, Loeb & Company and Morris Newburger was there, is that correct?

A I am not sure what Mr. Newburger's name was.

I think there were two Newburgers in the firm. It was a man I recall about six foot, greying hair. It might have been Morris.

Q Elderly man?

A Oh, I wouldn't say elderly. I would say in his sixties or so.

Q And Leo Stern was there about the same age?

A That is right.

Q Anybody else there at that first meeting?

A I am not certain whether that was when I met Mr. Jordon or not. I don't recall. I really can't say for certain.

Q And the best you can fix the time for of that meeting is when, sometime in '66?

A I would say, oh, I would say sometime in the fall of 1966.

Q Was David Buckley present at that meeting, too?

A Again, I am not certain whether I met with Mr. Stern and Mr. Newburger the first occasion by myself or with my client. I am not certain.

Q Do you remember any conversation at that meeting about the possibility of Mr. Buckley taking out a life insurance policy on his father's life?

A On his father's life?

Q Yes.

A No, I don't recall that.

Q You don't recall anything about that?

A No.

Q You had spoken to Mr. David Buckley to ascertain the facts about this matter before you went to that first meeting, had you not?

A Oh, yes.

Q At that meeting you did not assert or hint in any way that Newburger, Loeb had done anything wrong?

A I would say that is correct, yes.

Q You had a subsequent series of meetings through '67 and '68, is that correct?

A Well, there were telephone conversations during that period of time. Mr. Stern would call me periodically and make a request for payment or has the situation changed or things of that nature.

I don't recall going -- actually having a face-to-face meeting after the first six months or so after the Westec went into bankruptcy until six months or so before the stock was reopened for trading.

I could have, by the way.

Q In the telephone conversations, am I right that Stern was saying, we have got to be paid and you were saying, the poor man has no money, he can't pay you.

A That is correct.

Q And you still were not asserting any claim of any wrongdoing on anybody's part?

A At that point, that is correct.

Q Now, I would like to establish, if I can, the first time you ever asserted in writing a claim that somebody had done something wrong to David Buckley's account?

A I would say it would be the pleading would be the first writing.

Q It would be the setoff and counterclaim in the arbitration proceeding and that is the document you looked at which is Plaintiffs' Exhibit 28 in evidence and the date of that is August 13, 1970, is that correct?

A That the date is August 13th?

Q Will you take my representation?

A Oh, certainly.

Q All right. Now, what was the first time, and I am trying to fix the time, Mr. Ryan as well as we can, that you ever asserted orally to anybody at Newburger, Loeb that something wrong had been done with regard to Buckley and there might be counterclaims?

A It would have to be, Mr. Mandel, I would say six months or so before the stock reopened. There was some publicity in the paper that trading was expected to resume in Westec or something like that and I received a call from Mr. Stern and I went down to see Mr. Stern.

That is when I --

Q What did you say to him then and what did he say to you?

A Well, my recollection is it was only Mr. Stern. I think that Mr. Newburger, I think he passed away around this period of time. I don't think he was there at this meeting and I discussed with Mr. -- first of all, there had been some discussions before with Mr. Stern regarding the activity in this account and the fact that apparently Mr. Buckley was not the only customer of Newburger, Loeb who was in a predicament over the Westec situation.

I recall Mr. Stern had a huge, not a huge, a pack of trade tickets or balance tickets, credit balance tickets or something like that in his hand and he said, "We have a problem which we are working out."

At that point in time I said, "Well, Mr. Stern, you have this problem," and I pointed out to him what

I had advised my client in the event that we were unable to resolve the matter in an amicable way.

Q What did you point out to him?

A I pointed out to him that I had advised Mr. Buckley that in my opinion he had certain valid claims against Gross & Company and Newburger, Loeb for certain conduct.

Q Did you explain the nature of the conduct to Mr. Stern?

A Oh, yes.

Q What did you tell him? Did you tell him -- let me put it this way:

MR. GRUTMAN: One question at a time, your Honor.

MR. MANDEL: Let me withdraw that.

Q Is what you told Mr. Stern at that time substantially the same as what you put in writing in the answers set off in the counterclaim?

A That is correct, yes, that is what we discussed.

Q That was, as you say, six months before?

A I would say that it was in the six-month range before the trading because there was a period of time when no one knew what the opening price was going to be on Westec stock and we had -- I had agreed on behalf of my client to take or obtain I think it was like 3,000 shares of Westec which was used as collateral at Merrill Lynch and turn it over to Newburger, Loeb as additional collateral for the account making it like 13,000 shares or something like that and if Westec had opened up at 40, we would have no problem. There would be sufficient collateral in the account to secure the loan. It depended upon what the opening price was of the Westec stock, which we didn't know, and I said to Mr. Stern, there is no point in us taking off our gloves and getting into a fight when you may not have a problem and my client was not interested in getting involved in lawsuits.

Q So, while you were telling Mr. Stern that Buckley had good claims against Newburger, Loeb, you were simultaneously giving securities of some determinable value to Newburger, Loeb?

A That is correct.

Q Against their claimed debit?

A That is correct.

Q Now, isn't it true, also, that in the early part of 1970 -- excuse me, Mr. Ryan, do you have any documents anywhere that would establish the date of your first oral conversation in which you made a claim that there had been some wrongdoing?

A I keep a diary, a lawyer's diary, of meetings and conferences I have and I would anticipate that there might be a mention in my diary of the meeting I had with Mr. Stern, you know, but it wouldn't have what I said. It would just say I met with Mr. Stern regarding Buckley.

Q You met with him on a number of occasions. What my interest is is to establish definitely, if we can, the first date or time at which you made the oral claim that Buckley had some complaint or counterclaims? Do you think you would be able to do that from your files or your diary or any other way?

A Well, I would have to look. I don't know. I would have to search. Go back to my diaries. There is nothing in my file, you know, my correspondence and things like that. It would have to appear in my diary. I made no memorandum of the meeting or anything like that.

Q As far as you know there is no writing to show a claim earlier than the writing of August 13, 1970? I am just talking about the writings?

A I think that is a different question.

Q All right. I don't want to spend too much time on this.

Now, you were retained by Mr. Buckley in order to get him off with paying the full amount of his debit balance, is that correct?

A Would you repeat the question, please?

(Record read.)

MR. SHAW: Off from?

THE COURT: I will sustain an objection to the form of the question.

Q In your conversations with Mr. Buckley did he tell you that is objective was to make a settlement so that he would have to pay the lowest -- be able to pay the lowest possible amounts and obtain a release from Newburger, Loeb?

A No.

Q What did Mr. Buckley tell you the objectives of your activities were to be?

A Mr. Buckley asked me to represent him in this matter. He wished to avoid any litigation at all if at all possible.

He wished to be responsible for whatever was his responsibilities and he asked me to advise him according

That is the best I can describe it, what a client normally comes to a lawyer for.

Q So that in the first year you were representing him, in the first year you were representing him, all that you said on his behalf to Newburger, Loeb was, he can't pay the money now, maybe he will be able to do it later. Is that right?

A Well, that was not only the first year. That continued. That was the problem. We didn't know we had a problem until --

THE COURT: No, there is no question pending.

THE WITNESS: I'm sorry.

Excuse me.

Q I would like to get back to this:

Shortly before the arbitration was settled -- I mean the arbitration was commenced, do you recall that a proposal was made on Mr. Buckley's behalf, either by you or somebody in your firm, to pay $25,000 which he would obtain from his father because he had no money of his own, but for a release his father would put up $25,000?

A I am not sure of the timing, Mr. Mandel, whether it was before or after the arbitration. My recollection is that there were conversations and then the demands for arbitration came as somewhat of a surprise.

Q I see. The best of your recollection, what was the first time that a proposal was made that this matter be settled by a payment made by Mr. Buckley's father?

A The first time that was suggested?

Q Yes.

A Oh, that was suggested back in 1966.

Q In 1966 --

A The first meeting.

Q You said to Mr. Leo Stern and Morris Newburger, "David can't pay all of this money, but Mr. Buckley, Sr. will pay"?

A No, no, no, the reverse. They said to me that I should request or ask Mr. Buckley to pay for David Buckley, Mr. Buckley, Sr.

Q My question now is when for the first time did your side say, Mr. Buckley, Sr. was willing to pay if Junior would be released?

A It was in that timeframe that you are saying, either just before or just after the arbitration began. Sometime after the stock opened. If you could tell me what that date was, well, then, within, you know, weeks or so of that we had another conversation, whether it was before or after arbitration I don't know, and that is when I made the proposal.

Q All right.

MR. MANDEL: Can we stipulate that the stock opened in May of 1969?

MR. SHAW: Yes, we can, your Honor. I believe the date is May 5th although there has been some testimony that it is May 15, 1969.

MR. MANDEL: All right.

Q So that about May 15, 1969 your proposal was Mr. Buckley, Sr. will pay if there can be an exchange --

A I don't think I disclosed that Mr. Buckley, Sr. was going to pay. I said we would make a proposal to pay. As you mentioned it was $25,000 with an exchange of releases.

Q All right. Now, that proposal remained open, did it not, until the arbitration was started and that is why you were surprised when the arbitration was started?

A That is possible. I really have no recollection as to whether it was before or after the arbitration. I really can't say for certain. I don't know.

Q All right. Is it fair to say that after the service of the first arbitration papers made by Newburger, Loeb your proposal still remained open for negotiation?

A Oh, yes.

Q Now, your claims against -- the claims set forth in your answer set off and counterclaims were set off --

were asserted against Newburger, Loeb, is that correct?

A That is correct.

Q They were not asserted against Mr. Jordon?

A That is correct.

Q And they were not asserted against Gross & Company?

A That is correct again.

Q You never made any demands upon Mr. Jordon for any kind of restitution for any alleged wrongdoing, did you?

A Mr. Jordon personally?

Q Yes.

A No.

Q You never sued Mr. Jordon?

A That is correct.

Q You never threatened to sue him?

A You are talking about Mr. Jordon personally?

Q Right.

A That is correct, yes.

Q You never sent Mr. Jordon personally a claim letter?

A That is correct.

Q And the same is true for Gross & Company, is it not?

A Well, that is a little bit more difficult to answer yes or no.

Q Well, did you ever address a letter to Gross & Company?

A No, I don't believe I ever addressed a letter to Gross & Company.

Q Did you ever speak to Mr. Charles Gross?

A No, I don't recall ever meeting Mr. Charles Gross.

Q You never sent Charles Gross any demand letters or complaints or anything of that nature?

A Personally, no.

Q Now, actually when you put in your answer set off and counterclaim, you only asserted five claims of wrongdoing, is that correct?

A Three separate claims.

Q Yes.

A That is correct, yes.

Q And one was for churning?

A That is correct.

Q And do you happen to remember what the amount was of the churning claim?

A I read it this morning, $75,000.

Q $75,000?

A That is correct.

Q Was the interposing of the answers and the counter-claim and set off which your law firm put in the arbitration interposed on Buckley's behalf by your law firm as a way of simply getting the best settlement for Mr. Buckley that you could?

A No.

Q When you interposed the set off and the counterclai did you believe that they had a color of merit?

THE COURT: Sustained.

MR. GRUTMAN: Your Honor, I submit that Mr. Mandel has opened the door on the propriety of the submission of the counterclaims and set off.

THE COURT: There is an objection on the ground of form. What does color of merit mean?

Q What did you believe concerning the assertion of the offset and counterclaims?

A I believed that the offset and counterclaims were meritorious.

MR. GRUTMAN: Thank you, sir, I have no further questions.

RECROSS EXAMINATION

BY MR. MANDEL:

Q Now, you had no personal knowledge of the facts behind those counterclaims, did you?

A Yes, I did.

Q Did you have personal knowledge of the dealings between Jordon and Buckley?

A What do you mean the dealings? I don't understand the question.

Q Did you have personal knowledge of anything that had passed between Jordon and Buckley which was embodied in your counterclaims and set offs?

A Yes.

THE COURT: Personal knowledge. You weren't there when they were talking?

THE WITNESS: Well, no, I had the 1,100 transactins, confirmation slips which would be --

THE COURT: That wasn't his question.

Q Did you have any personal knowledge beyond that?

A No.

Q Did you, yourself, count the transactions?

A Did I?

Q Yes.

A No.

Q So you didn't even have personal knowledge of that, right?

MR. GRUTMAN: I object to that, your Honor. Law firms of that size don't operate by individuals.

THE COURT: Overruled.

A Now what was the question, sir.

THE COURT: Read it.

Where you personally counted the 1,100 transactions.

A No, I didn't count them.

Q You didn't have personal knowledge of that?

THE COURT: He answered, Mr. Mandel.

Q Did you know whether the 1,100 transactions include each sale and each purchase as two transactions or one transaction?

A There were purchases and sales.

Q Was a purchase and sale of the same security one transaction or two?

A Securities are fungible.

Q In counting the transactions?

A Yes, sir.

Q In making --

A There were 1,100 transactions some of which were purchases and some of which were sales.

Q Were some of them calls?

A Do you mean a call option?

Q Yes.

A Possibly, I don't know.

Q You don't know. And when you say you thought the complaint was meritorious, you mean based on some facts of which you did not have personal knowledge, is that correct?

MR. GRUTMAN: I object to the form of the question and to the substance.

THE COURT: No, I will overrule the objection.

MR. SHAW: Could we have the question reread, your Honor.

THE COURT: Yes.

(Question read.)

MR. GRUTMAN: Your Honor, the lawyers don't have personal knowledge. We are vicarious for our clients.

THE COURT: I know, that is what he is trying to establish.

THE WITNESS: That is correct.

THE COURT: That is exactly what he is trying to say.

THE WITNESS: That is correct, yes.

Q When you say that you thought the claim was meritorious, you don't mean to say you thought that Mr. Buckley would win if the claim was pushed through, do you?

A I always think I am going to win.

Q You mean that seriously, Mr. Ryan?

A Yes.

THE COURT: He always thinks he is going to win.

A I always think I am going to win.

Q You always think you are going to win?

MR. GRUTMAN: Your Honor, this is a silly argument.

THE COURT: Sustained, I agree with you.

MR. MANDEL: Nothing further.

REDIRECT EXAMINATION

BY MR. GRUTMAN:

Q Just a few question and I am done.

When you said that the set off and counterclaims in your opinion were meritorious, you said that you had only limited personal knowledge, is that correct?

THE COURT: No, he didn't say that.

Q Was your knowledge limited -- to what you learned from examining the transaction slips, correct?

A Correct.

Q And from what your client told you, is that correct?

A Yes, and also other facts.

Q What other matters, please?

A Well, we had retained, his name is Frank O'Hara, who was a margin clerk with, I forget the name of the firm now, he has since passed away, but he made a detailed analysis of all of the transactions for us.

Q As an expert?

A No, I wouldn't say he is an expert other than an expert margin clerk and we were investigating to see, you know, what the situation was.

Q Did you rely in part upon his opinion?

A Excuse me.

Q Did you rely in part upon the advices which you obtained from Mr. O'Hara?

A Yes.

MR. GRUTMAN: Thank you very much.

RECROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Ryan, when did you retain Mr. O'Hara?

A Right at the very outset. There is a letter in my files which indicates that on September 15th, I think it was, 1966 we transmitted the confirmation slips to Mr. O'Hara.

Q Did you get a written response from him?

A I don't think -- I haven't seen any written response in the file, Mr. Mandel, and I don't recall ever seeing one.

Q I thought you said you had a report from him? That was part of your knowledge, Mr. Ryan?

A Yes.

Q Where is the report?

A It was an oral report.

Q And despite that oral report you never asserted any claim of wrongdoing until two or three years later, is that correct?

MR. GRUTMAN: Your Honor, that is an argumentative question.

THE COURT: Yes, sustained. I sustain the objection. That is argument.

The facts are established from which you can make that argument.

Anything further?

MR. GRUTMAN: Just one moment.

(Pause.)

MR. GRUTMAN: Nothing further. I am much obliged to you, Mr. Ryan.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Mr. Buckley, if you will resume the stand, please.

DAVID W. BUCKLEY, resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. GRUTMAN (Continued):

Q Mr. Buckley, did you have any communication with Mr. Ryan, who has just testified, asking him to sue on your behalf?

A Asking him to sue?

Q Yes.

A You mean by sue a case like this?

Q Or make a claim on your behalf?

A Not that I recall, Mr. Grutman.

Q Did you ever send anything to him about churning?

A Yes, I did.

Q When was the first time you ever did that?

A I don't recall the first time.

Q I believe we left off in the examination of your testimony before Mr. Ryan came on the stand with the circumstances relating to the conversations had between you and Mr. Jordon when you were out in Wichita and you had requested him [illegible] sell out your Westec position.

MR. MANDEL: Excuse me. I object to that. Mr. Grutman said he requested to sell out his stock. That is not the testimony.

THE COURT: The jury's recollection of the testimony will govern. The statements of counsel are not evidence.

Go ahead.

Q Did you ask --

THE COURT: Wait a minute. Haven't we concluded that area of testimony?

MR. GRUTMAN: I know where I left off, Judge. I am going to something else. I think we had pretty well--

THE COURT: You had concluded Wichita?

MR. GRUTMAN: Yes.

THE COURT: Let's be clear we are going on to something else.

MR. GRUTMAN: Going on to something else.

THE COURT: All right.

Q The fact is that after Wichita Mr. Jordon did not sell any of your shares of Westec which Newburger, Loeb held as the clearing house?

THE COURT: I sustain the objection on the grounds of form.

MR. GRUTMAN: On the grounds of --

THE COURT: There is no foundation for that. As I understand Wichita, he left it with the absence of a direction to sell, is that correct?

Q So none of your shares held at Newburger, Loeb were sold after the Wichita conversation, is that correct?

A Not until 1970.

Q At or about the time that you had the conversation in Wichita, did you sell any of your shares that were held at Merrill Lynch?

A Yes.

Q So did you call up Merrill Lynch and ask Merrill Lynch to sell your Westec shares?

A Before the Wichita conversation.

Q Before the Wichita conversation?

A Yes, I did.

Q Did anybody at Merrill Lynch try to dissuade you from selling your Westec shares?

A No, they did not.

Q They simply executed your order, correct?

A Yes, they did.

Q Did anybody at Merrill Lynch tell you about a Chilean copper exploration?

MR. MANDEL: I object.

THE COURT: Sustained.

Q Do you recollect, Mr. Buckley, whether or not prior to the Wichita conversation you had ever had any other discussions with Mr. Jordon where you had expressed an intention to sell the Westec stock?

A No, I do not. Mr. Grutman, just to make the record clear, not to sell that balance that was left. I have testified earlier that I had purchased Westec starting at 3 and we had sold some at 5 or 6 so obviously for those shares involved I had conversations with Mr. Jordon.

Q When Mr. Gross got your account and these transactions were going on in 1962 through 1966 -- I am sorry, I want to reframe that question.

When Gross & Company got your account and Jordon on behalf of Gross & Company, acting as your broker, did you hear from him by telephone?

MR. MANDEL: I object to that question.

THE COURT: On what ground?

MR. MANDEL: On the ground that it is leading and conclusory. He is saying when Gross & Company got your account and Jordon became your broker.

THE COURT: Overruled.

Go ahead.

Q Do you have my question in mind?

A Did I receive telephone calls?

Q Yes.

A Yes, I did receive telephone calls.

Q How many times a day would you hear from Mr. Jordon?

THE COURT: Haven't we established that on direct examination.

MR. GRUTMAN: I am leading to another point, your Honor.

THE COURT: Why don't you?

Q Did you get about six telephone calls a day?

MR. MANDEL: I object to the leading.

A Just to get going -- excuse me.

THE COURT: I have been trying to save time because he testified to the amount of calls he received earlier and then later. What is the next question?

MR. GRUTMAN: I haven't got it established, Judge.

THE COURT: It was established on direct examination.

MR. GRUTMAN: Can we have it that it was about five or six times a day?

A It was more later than earlier. In the earlier periods I believe I testified about ten per week and near the end of this period, '65 and '66, between 60 and 70 per week.

Q 60 or 70 phone calls per week?

A Per week. Excuse me, I multiplied incorrectly. I believe I said six or seven a day, excuse me. 30 to 35.

Q During this period of time, Mr. Buckley, you were acting as an executive at Lever Bros. working the hours that you told us, is that correct?

A That is correct.

Q It was during this period of time that many of your children were being born, isn't that true, too?

A That is correct.

Q And during this period of time, Mr. Buckley, how was your physical health?

A My physical health had its ups and downs.

Q Had you been hospitalized during this period of time?

A Yes, I had.

Q On four occasions?

A Yes, I had.

Q Was one of them for cancer?

A One of them was for -- all four, excuse me, two of the four were for suspected cancer, yes.

Q Did you, among other things, have a pin put in your femur?

A That is correct.

Q Your femur is your thigh bone?

A That is correct.

Q And during this period of time while you were at work were you getting dressings on the drain from your femur?

A Yes, I was.

Q For how many years were you getting dressings from the drain running on your femur while at work?

A About a year and a half or two years.

Q How many times a day would that dressing have to be changed?

A In the beginning half a dozen. Near the end, less.

Q While you were preoccupied with having the dressing changed on this fractured femur and these circumstances, was that during the years that Mr. Jordon was your broker?

A I didn't --

MR. MANDEL: I object as to form.

THE COURT: Well, having let it go this far, I will overrule the objection at this point.

A I don't remember saying to you now or before that I was preoccupied.

Q Whether you were preoccupied, did this happen -- these things about your physical health while Mr. Jordon was your broker?

A Yes.

Q And were you getting six or seven telephone calls while these things were happening in your life?

A I believe I said during the earlier period of time I was getting an average of two telephone calls a day or five to ten per week. This was near -- the leg problems were near the opening of the period than the close so six or seven is probably a little high.

Q Before you met Mr. Jordon had you had a brokerage account with some other house?

A Yes, I believe I said that. Yes, I did.

Q The name of that house was what?

A The one before Mr. Jordon I just don't recall.

Q What was -- did you have a margin account at that other brokerage house?

A I don't believe so.

Q Did you run a debit balance?

A I don't believe so.

Q Think if you would, Mr. Buckley, whether or not prior to meeting Mr. Jordon you ever had a debit balance in excess of $15,000 anywhere?

A Yes.

MR. MANDEL: Excuse me, please.

A I believe I had testified earlier that I opened an account with Mr. Jordon in July of '59 when he was with Hayden Stone or clearing through Hayden Stone. That I had had an account prior to that time with a house that I did not recall at about that time and perhaps a little bit afterwards that I had an account with Merrill Lynch. The Merrill Lynch accounts I did have a debit balance and it probably was in the area of $10,000 to $15,000.

Q $10,000 to $15,000.

Did it ever exceed that?

A I don't believe so. But those records are in evidence.

Q In the Merrill Lynch account, was that handled by your friend Mr. Irish?

A At one point, yes. He left the firm so it was not handled by him.

Q How many trades would you make in the Merrill Lynch account?

A I would define them as transactions.

Q Transactions?

A Perhaps two, maybe three per month.

Q And over how many years was the volume of activity in your trading account, one, two or three per month?

A If one averages the ten-year period from 1960 through 1970 --

Q No, before the advent of Mr. Jordon in your life. Before Mr. Jordon came in either at Hayden Stone or at Gross & Company, up to that time for what period was the frequency of transactions, one, two or three a month?

A The one, two or three were at Merrill Lynch. I testified that the Merrill Lynch was after I met Mr. Jordon or immediately parallel to it. The unknown brokerage firm before Mr. Jordon I don't believe had more than a half a dozen transactions over the possibly a year that I had the account.

Q And with Mr. Jordon could you give us an approximately of the number of transactions you would have a month say in 1963 or '64?

A I can only divide by 12. 20 per month for 1963 and 45 per month for 1964.

Q 45 per month in 1964?

A Yes.

Q Were these transactions in small amounts or large amounts in '63 or '64?

THE COURT: That question ends up with an answer that is worth nothing. I sustained as to form.

MR. GRUTMAN: We don't have this broken down by securities. That is what I am coming to. I don't know whether your Honor wants me to start it now.

THE COURT: Go ahead.

MR. GRUTMAN: All right.

Q I will begin it this way, if I may, Mr. Buckley. You told us that of the securities that were transacted in the accounts as reflected in the document on the blackboard, about 90 per cent of them were Mr. Gross' -- rather Mr. Jordon's suggestion and 10 per cent yours, is that right?

A I believe I said 80 to 90.

Q Do you have a recollection in your own mind of the number of securities in all those transactions which you initiated by suggesting?

A Not by major security. By major security I mean a company in which I had relatively major holdings, but I do have in mind, I may have confused this answer. Let me make it clear.

I very clearly have in mind the companies in which I had a major holding that were of my volition and the ones that were of Mr. Jordon's volition.

Q Can you give us what those companies were and the numbers of shares that you had in each?

A I have summarized this, if I may use it, it would be more certain.

Q Please do.

A The companies are very precise in my mind. The numbers of shares are estimates. I do not -- I am sorry. The companies I referenced are very definitely in my mind. The number of shares in each are approximate but pretty good approximations.

Q All right.

A A company of Mr. Jordon's, I will give the companies of Mr. Jordon's volition first and the approximate numbers of shares.

Q Fine. Go ahead, Mr. Buckley.

A Mr. Jordon's suggestions, a company called Dalto about 4,000 shares.

A company called Fifth Avenue Coach Lines either common stock or calls in the common stock, about 10,000 shares.

Q What were the prices of these stocks, by the way?

A Dalto was less than $10 a share. Fifth Avenue Coach, the equity was about $30 per share.

Q $30 per share and the number of shares involved?

A Of equity versus calls I can't split.

Q Equity.

A Equity and calls were 10,000.

Q That would be $300,000 worth of transactions?

A Obviously if they were all equity.

Q Go ahead. These are all Jordon's suggestions.

A Yes.

The third Mr. Jordon major, if you will, suggestion is a company called Technical Operations, about 5,000 shares all equity.

Q Price?

A Oh, probably in the 20s.

Q $100,000 worth of transactions in that item.

Go ahead.

A That is really incorrect. If you want transactions it is 100 in and 100 out, if you got out at the same price as you got in, which was not the case.

Q Very well.

A The fourth suggestion of Mr. Jordon's, another company called Savoy, about 8,300 shares all equity.

Q What price?

A Probably $25 a share.

Q That is $267,500 in and $267,500 out?

A Unfortunately the out was not $267,500.

Q All right.

A The fifth major holding was one that has already been discussed, Syntex Corporation. I did not, I cannot approximate the number of shares. As I have already testified, there were split shares so that they are not readil comparable. If you want a number I would say about 4,000 or 5,000 shares.

Q All right.

A Syntex on a pre-split basis as I recall was trading over 100. On a split basis about 40 or 50. That was Mr. Jordon's suggestion. The sixth and last of Mr. Jordon's was Westec, the company that we have discussed and I won't go into that.

Q Approximately what is the total volume of shares that were purchased in and out at Jordon's instance, what he recommended and suggested that you buy or sell?

A I have no number in mind.

Q How about the shares or the securities which you suggested?

A We have discussed in the testimony already of the major shares of a company called Callahan Mining.

Q The number of shares?

A I believe the number was about 25,000.

Q And the price per share?

A I think Callahan was about 15. it trades at 9 now.

That is the complete listing of those securities that are listed there of the stocks that under my definitions would be called major or relatively major. They are certainly major holdings for me of stocks of my volition and stocks of Mr. Jordon's.

Q Would it be fair to say that both in terms of volume and cost Mr. Jordon's suggestions greatly predominated the accounts over your own?

A I believe I have already testified as far as volume the 80 to 90 per cent of the volume. As far as cost I have no figure.

Q To what extent did you rely upon Mr. Jordon?

THE COURT: Are you going on to another subject? We will stand in recess until 10:30 on Monday morning.

Have a good weekend.

Counsel stay a minute, please.

(Jury left courtroom.)

THE COURT: Mr. Grutman, I find no fault with this, but you are in a sense having further direct examination with this witness. This really has nothing to do with Finley, Kumble at all.

MR. GRUTMAN: Judge, I don't understand, if I may say, I am in this courtroom and everything that comes out of Mr. Mandel,and he goes on at some length, is all heard by the same jury that has ot assess and weigh all of this evidence which involves me and I think that with some propriety I should have a right to deal with some of the matters raised by Mr. Mandel.

THE COURT: No question about that. But the

NEWBURGER, LOEB & COMPANY, INC., etc.

-against- 71 Civ. [illegible]

CHARLES GROSS, MABEL BLEICH and
GROSS & COMPANY,

Defendants.

June 23, 1975
New York, New York

(In open court - jury present)

DAVID BUCKLEY, having been previously duly sworn, resumed the witness stand and was examined and testified further as follows:

CROSS-EXAMINATION (Continued)

BY MR. GRUTMAN:

Q On Friday I believe you had contrasted for us according to your recollection the securities which you suggested to Mr. Jordon and initially as contrasted with the securities which Mr. Jordon had suggested to you; is that correct?

A The securities that were of a mjor magnitude, yes; not all of them.

Q In these various transactions, to what extent did you rely upon Mr. Jordon's advice?

A On the ones that were his suggestion. --

Q Yes?

A Yes.

Q My question was to what extent or in the relationship that you had with Mr. Jordon, to what extent did you rely upon him?

A If not completely, almost completely.

Q When Mr. Jordon would make a suggestion to you, did you go along with it generally?

A Yes.

Q In 1962 when these transactions begn, you were 31 years of age; is that correct?

A That is correct.

Q Did you at age 31 know what salvaging a call was?

A No, and as I testified the other day, I still don't.

Q In 1962 when you got started in these transactions with Mr. Jordon, did you know what a put was?

A I had heard of it, but I must say I did not know.

Q Was your knowledge about calls the same as your knowledge about puts in 1962?

A Probably a little more. I woudn't say it was extensive; only because I bought them.

Q Did you know what a strip or straddle was?

A No, I did not.

MR. MANDEL: Objection.

THE COURT: Sustained.

Q How much knowledge did you have about the intricacies of securities trading in 1962?

A Very little.

Q Was that true in 1963?

A Yes.

Q '64?

A Yes.

Q '65?

A Yes.

Q And '66?

A Yes.

THE COURT: What does "intricacies" mean?

MR. GRUTMAN: The sophisticated knowledge which Mr. Mandel was questioning about in the questions he put here thirteen years after the fact.

THE COURT: You can put the question. That doesn't seem to get you much. It's factually of assistance to the jury.

Q Would you then tell us how much knowledge and experience you had in securities trading before the year 1962?

A Not -- very little. If it would help give some dimension to it, can I just use an analogy? I had described earlier that I had been in hospitals several times. The stock market to me was more or less like your profession or a medical profession, not that they are as professional perhaps but the market and the people that are in the market were more in the area of professionalism to me than for amateurs.

I would describe myself then and still now as an amateur.

I was not in the business. At that point in time when I needed a doctor or attorney, I retained one, as I guess this case brought out, and I would almost describe the same analogy for the securities markets.

MR. MANDEL: I am going to move to strike as not responsive.

THE COURT: Strike the answer.

What does an "amateur" mean?

We are getting here generalizations without any facts.

Q Did you have any special training in securities transactions.

A No, I did not.

Q Had you ever worked in the securities business?

A No.

Q Had you ever made any special study of the securities business?

A I took one course in college on securities analysis.

Q A general survey course, was it?

A Yes.

THE COURT: No, please.

Q What was the nature of this one course that you had in your undergraduate days at college?

A It was three hours. It was in graduate school. Three hours out of 180 hours, entitled, "Securities Analysis," I believe.

Q Other than that had you had any other formal training in securities analysis?

A No, I had not.

Q When you described yourself as an amateur, a word which Judge Owen asked you about, what did you mean by saying you were an amateur?

A Amateur versus pros, people get paid for being professional, and people do not get paid for being an amateur.

Q Did you regard Mr. Jordon as a professional?

A Yes.

Q In the same sense as a doctor or lawyer?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Did you trust Mr. Jordon?

A Yes. I used that word before. It was in the relationship of trust.

Q I think you said that the suggestion for engaging in this speculative kind of transaction called a call were suggestions made by Mr. Jordon; is that right?

A That is correct.

Q When you bought or sold a security other than a put or a call, did you know who the sller of the security was or the buyer of the security in such a transaction?

A No, I did not.

Q When you are involved in a put or a call situation, is that a relationship where you have a dealing with a specific opposite person?

A As I undertand and still understand the business, my broker in this case, Gross & Company, and Mr. Jordon would have a specific dealing with a named person or firm who was then listed on the confirmation slip, yes.

Q Is it correct, Mr. Buckley, that in all the call transactions you engaged in, you lost money?

A If you want my recollection, yes, that is correct.

Q Did you know at the time that you followed Mr. Jordon's suggestions that he himself was the other person on the side of the call transactions in which you lost money at the time that you undertook the deal?

MR. MANDEL: Objection on the ground there is no foundation.

MR. GRUTMAN: It is in evidence.

THE COURT: What is in evidence.

MR. GRUTMAN: The fact Mr. Jordon was on the other side of the transaction. It is reflected on Exhibit 9. I will show it to your HOnor.

It is Exhibit 11, your Honor.

THE COURT: The objection is overruled.

Q At the time you entered the call transactions on which you lost money, did you know in any instance that Mr. Jordon, your broker, was the opposite person on the side of the transaction; did you?

A No, I did not.

Q I show you on Exhibit 11 and invite your attention to a transaction involving a call on 300 Technical Animation, which expired July 1, 1963; and do you see the name C. Jordon?

A Yes.

Q Does thatindicate to you that it was Jordon who was on the other side of that call?

A Yes, it does.

Q Did you know that at the the time that Mr. Jordon suggested that you make the call purchase?

A No, I did not.

Q Did you lose money on that, to the best of your recollection?

A To the best, yes.

Q I show you on the same ledger card as part of Exhibit 11 400 Fifth Avenue Coach Lines, a call expiring July 19, 1963, where Mr. Jordon's name again appears as the person on the other side of the transaction.

Did you know at the time that Jordon suggested you buy that call that he was the other person on the other side of the call?

A No, I did not know that.

Q I show you another one, part of Exhibit 11, for 200 Fifth Avenue Coach Lines, expiring August 1, 1963, where Mr. Jordon's name appears as the person on the other side of the call.

At the time Jordon suggested you enter that transaction, did you know that he was the person on the other side of the transaction?

A No, I did not.

Q In those transactions you lost money, Mr. Buckley?

A To the best of my knowledge.

Q If you lost money, did that mean Mr. Jordan made a profit as the person on the other side of the transaction?

A I would assume so.

THE COURT: Strike the answer out.

Q To the best of your then understanding as it existed at the time of those transactions, if you lost money, what was the effect of Mr. Jordon on the transaction?

A I didn't know Mr. Jordon was involved. But the person writing the call must have made money if I lost money.

Q If that person was Mr. Jordon as an investor, he made money and you lost; correct?

A Correct.

Q And in addition did you also pay Mr. Jordon a commission on those transactions?

A Yes, I did.

Q Mr. Buckley, some questions were asked of you concerning paper profits about what the portfolio securities were worth at a given point in time when some of these stocks were at the top point of the parabola, so to speak.

Those were unrealized; is that correct?

A That is correct.

Q However, while you were in this game, if you will, you were borrowing money from Newburger, Loeb on margin, were you not?

A That is correct.

Q If you made a profit and the profit exceeded the amount of the borrowing, the profit was yours; is that right?

A Talking actual profits or paper profits?

Q If there were a profit realized and the profit exceeded the amount of your borrowing from Newburger, Loeb, that could be a profit you could realize; correct?

A Yes.

Q But that is not what happened in the case of your portfolio, is it, on an overall basis?

MR. MANDEL: Objection.

THE COURT: Sustained.

We have to get away from leading questions which have been coming with some frequency.

Q Mr. Buckley, did you make a profit on the sale of Westec?

A In the earlier transactions, yes, I did.

Q On an overall basis of the total portfolio of the 11,000 or 13,000 shares that you had purchased of Westec through Mr. Jordon, was that profitable or a loss?

A It was a loss.

Q As part of the loss, not paper loss but real loss, were you left with the debt to Newburger, Loeb?

A Yes, I was.

Q And the amount of that debt at the time of the closing down of Westec was how much in real dollars?

A It must have been about $260,000, because it was $289,000 with accumulated interest three months later.

Q So you suffered a loss in that respect, is that correct?

A That is correct.

Q Did you also suffer a loss of the paper profit?

A Absolutely.

Q When I speak of the paper profit, I mean what profit there would have been had your portfolio in Westec been liquidated in the Westec --

THE COURT: Don't answer that. That is leading.

You are defining something for us and asking the witness to say yes or no.

Q What would have happened or what would have been the net effect on your position in Westec if the Westec shares purchased through Jordon had been sold out when you called him in Wichita?

A There were 11,300 shares which Mr. Jordon controlled at a price of about 45 at that time; that would have been about $300,000 just in Westec.

There were other securities still in the account but minor amounts. 500 less the 250 profit we would -- 260 debt would have been $240,000 profit in the account plus the remnants of the additional securities.

Q Was that loss?

A It certainly wasn't gained, so yes, it was loss.

Q In addition to which there has been testimony that as a result of the arbitration proceeding, $50,000 was paid on your behalf to sell the Newburger claims against you. Was that a loss to you?

A Yes, it was.

Q In addition to which, the side of the money paid to Newburger, Loeb --

MR. MANDEL: Excuse me. These are leading questions and misleading because he says "in addition."

THE COURT: I sustain the objection, and strike out the answer.

You may go into the subject with proper questions.

Q Besides the $50,000 which was paid to Newburger, Loeb on your behalf in the arbitration litigation, were there any attorney's fees incurrect?

A Yes, there were.

Q Could you give us an approximation of what they were?

A About $8,000.

Q Was that paid on your behalf?

A I don't know what you mean by my behalf. I paid it.

Q You paid it? Fine.

A Nobody else did.

Q In leading up to the account with Newburger, Loeb, you made some reference to other shares which you had at Merrill Lynch. Do you remember that testimony?

A Yes, I do.

Q Were those shares sold?

on the record.

As far as I am concerned, Mr. Mandel should object to leading questions and should not rely upon the Court to make that objection.

This is an improper tactic. This is an improper tactic on his part.

THE COURT: I see Mr. Mandel from time to time start to rise, which in effect means his knees are voicing an objection.

I have heard him voice from time to time objections. I know what he is objecting to, and to the extent that it is apparent he wants an objection on the record, I will rule on it.

There is some discretion in the Court in the manner in which the evidence is developed.

MR. MANDEL: We can also instruct the witness not to answer so quickly so there is time.

MR. GRUTMAN: I will ask only non-leading questions.

(In open court)

BY MR. GRUTMAN:

Q Sir, you told us about another brokerage account which you held currently with the Gross & Company account, and I am referring to the Merrill Lynch account; is that correct?

A That is correct.

Q When the loss was occasioned with Newburger, Loeb, what if anything did you do with your Merrill Lynch securities?

A I don't remember about the balance of the securities, but on Westec I approached the imminent reopening, if you will, in early 1970, and Mr. Ryan and I were in discussions as to what we should do.

We were obviously hypotheizing as --

MR. MANDEL: I object on the ground of hearsay. His discussions with Mr. Ryan aren't relevant.

THE COURT: Sustained.

A As the date of the imminent reopening of Westec approached, at Mr. Ryan's behest, I believe, I talked to Mr. Stern of Newburger, Loeb, who asked me if I had any additional collateral I could put into the account to counterbalance the large debt balance, and I said other than the 2500 shares at Westec at Merrill Lynch, I had not. And he asked me if I could transfer that, and I said I would be happy to, and I made arrangements, and that file is in evidence, so I won't go into it unless you want me to.

The arrangement was to transfer the 2500 shares over, which happened after some little problem at Merrill Lynch.

Q Did you have more than 2500 shares at Merrill Lynch when you made the phone call from Wichita?

A No, I did not.

Q Had you disposed of any of your Westec shares that were held at Merrill Lynch?

A Shortly before the telephone call I disposed of 500 shares and intended to dispose of the balance.

Q When you transferred the remaining 2500 shares to Newburger, Loeb, what was the next effect on you financially?

A It really wasn't any, because the stock was closed down and wasn't salable.

Q In the period between 1962 and 1966, did you know what the term "churning" meant?

A I didn't know. I had heard of it, but I didn't know what it meant.

Q When was the first time, Mr. Buckley, that you learned about the term "churning"?

A It was sometime before the Westec reopening, about 1968. I saw an article in the paper about it.

Q 1968?

A I would say 1968 I saw an article in the paper.

It was after '66 and before early 1970.

Q What did you do with the article in the paper?

A I clipped it and talked to Mr. Ryan about it.

Q In the course of your dealings with Newburger, Loeb, are you aware that in the arbitration there were certain claims or counterclaims which were asserted on your behalf by your lawyers?

A Absolutely. I was aware.

Q Could you tell us why those counterclaims were not previously asserted by you prior to the time that they were interposed in the answer?

A Yes. Mr. Ryan advised me that until Westec reopened there was no sense of loss on my part in the Westec part of the counterclaims, and there was also no sense of financial loss, if you will, on Newburger, Loeb's part, because nobody knew what the stock would be worth, and if it were worth around the 40 or 35 dollars a share, or less than that, I guess it would have balanced my margin balance, and Newburger Loeb would not have had a cause against me, they would have sold out the stock and satisfied the margin balance.

That was his feeling, and I agreed with him.

Q To your knowledge, did either Jordon or Gross or anybody else at Gross & Company ever meet with your wife, Mary Buckley?

A Never.

Q And was there an account at Gross & Company which was in your wife's name?

A Yes, there was.

Q To your knowledge, did your wife ever speak with Mr. Jordon, Mr. Gross or anybody else at Gross & Company who traded securities in her name?

A She spoke to Mr. Jordon, and at most half a dozen times,when he called my house to talk to me, and I was not there, and she answered the phone.

Q Do you know whether or not she discussed the subject of the securities transactions in her name with Mr. Jordon?

A I would be willing to say she did not, but I don't know.

Q I believe you mentioned that sometime in 1969 or 1970, you had some further securities transactions with Mr. Jordon; is that right?

A That is correct.

Q Did you have a brokerage account at the time you had the transactions with Mr. Jordon with any other broker?

A I had a dormant one at Merrill Lynch, "dormant," meaning it was not used.

Q When you spoke with Mr. Jordon, was it about some particular security?

A Yes, it was.

Q Would you tell his Honor and the members of the jury what security it was that you spoke with Mr. Jordon about in 1969 or 1970?

A It was not in 1969. It was in 1970. It was Westec.

Q What was the subject matter of the conversation about?

A The subject matter was simple, that I had need of a registered representative. I didn't know anyone at Merrill Lynch, although my account must have been assigned to someone, and would Mr. Jordon handle my account for me, and he said yes, he would.

Q Other than that transaction in Westec stock, have you had any other transactions or dealings with Mr. Jordon or Mr. Gross since?

A You say that transaction. There was more than one, but it was all with Westec and all with Mr. Jordon. That is the relationship I had with Mr. Jordon or Mr. Gross. It was not with Mr. Gross.

MR. GRUTMAN: Thank you very much, Mr. Buckley. No further questions.

MR. SHAW: I have some redirect questions, your Honor.

THE COURT: I think Mr. Mandel should examine.

CROSS-EXAMINATION

BY MR.MANDEL:

Q Did you hear Mr. Ryan on the stand say that in 1966 he hired an expert to make an investigation of your account for churning?

A I heard him say that he hired an expert. I didn't hear him say that he hired him to examine it for churning or only for churning.

I heard Mr. Ryan mention the expert.

Q And you knew of that activity at the time, didn't you?

A Yes, I did.

Q And you were in constant touch with Mr. Ryan?

A I'm sorry, Mr. Mandel. I knew of the activity. As I said, I didn't know whether the activity was for churning or something else.

Q What did you think it was for?

A I gave him the same bag of documents that you had received from me later. As I understand it, Mr. Ryan was asking Mr. O'Hara, I believe his name was, to go through the accounts to see if there was anything wrong with the way the accounts were handled from the basis of any rules or regulations from the stock exchange. This included arithmetic figures. He was adding and subtracting and doing everything.

Q Why did you ask Ryan to go through the accounts and have experts do it to find out if there was something wrong?

A I don't remember saying I asked Mr. Ryan to do that.

Q How did it come about? Did Mr. Ryan volunteer?

A Mr. Ryan's idea was to "Let's take a look at the account."

Q Did he come to your home?

A Mr. O'Hara --

Q Mr. Ryan.

A No. I was in the city. I saw Mr. Ryan in the city or talked to him on the phone.

Q How did you happen to talk to him about your account with Newburger, Loeb?

A He said, "Your account is in deficit. You owe money to Newburger, Loeb. Can I see the slips? I would like to go over the accounts."

I delivered confirmation slips and the monthly statements to him.

Q How did Ryan know your account was in deficit?

I think it's come out. I saw him after the closedown at Westec and said, "Jim, I've got a problem. My account's down, and I owe some money."

Q So he said,"Let's see if we can find out whether anything was done that was wrong and maybe save the money; isn't that right?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

MR. SHAW: It is two questions in one, bad with respect to form and it is argumentative.

THE COURT: That is a question of whether that was responsive. He is asking whether Mr. Ryan said that.

The objection is overruled.

MR. SHAW: It is for the purpose -- your Honor, the initial part of the question was correct, but the remaining part and what was the purpose was, I submit, improper.

THE COURT: It's a question about whether that is included in the conversation.

MR. SHAW: If the question is read back, you will see it is more than just a conversation.

(Question read)

THE COURT: Overruled.

A No, that is not the substance.

The substance was that I owed a substantial sum to Newberger, Loeb, and I would like him to handle the discussions with Newburger, Loeb for me, and he said, "Get me your papers, and I will see what is involved in the account.

I don't recall that he said there wassomething wrong with it.

Q Did you tell him how much you owed?

A Yes.

Q Did he need the papers to find out how much you owed?

A I think that is one of the things he was trying to find out, did I really owe that much.

Q At that time there was no suggestion on your part or his part that there was anything wrong in the account; is that your statement as to the conversation your understanding?

A Yes, that would be my understanding.

Q So you didn't say there might be something wrong, and he didn't say there might be something wrong?

A That is a fair statement.

Q Then he examined the account?

A The so-called expert.

Q And that was within a few months of August '66, right?

A Yes.

Q And then did you speak to Ryan again?

A About this subject?

Q Yes.

A Yes.

Q Did he tell you then there was something wrong with the account?

A No, he told me I owed Mr. O'Hara so much money for examining the account, and there was nothing -- I particularly remember it in the context of anything arithmetically wrong with the account, with the adding and subtracting wrong.

I was under the impression it was that nature rather than anything deeper, if you will.

Q But you spoke to Ryan a few months after the event, and he and the expert had examined your accounts, and he didn't say there was anything wrong, and the expert didn't say there was anything wrong, and you didn't say there was anything wrong; am I right?

MR. GRUTMAN: Objection.

THE COURT: What is the basis?

MR. SHAW: Form of summation; argumentative. It involves five questions in one.

THE COURT: Why don't you break it down into three separate questions?

MR. GRUTMAN: My objection also goes to the hearsay objection, what Mr. Ryan told him or what Mr. O'Hara told him.

We haven't had Mr. O'Hara here. I can't cross-examine that.

THE COURT: I know you can't, but that isn't the purpose for which this testimony is offered.

The objection is overruled.

A I think I recall your question.

Q All right.

A The summary of our conversation, Mr. Ryan's and mine--I did not speak with Mr. O'Hara-- was that there was nothing wrong with the account from the standpoint that Mr. O'Hara looked at it.

I can't give you chapter and verse as to what specifics he looked at it for.

Q But you can be sure about this: After examining the account, Mr. Ryan didn't say to you, "It looks like there was churning or anything else that we can against these people"?

MR. GRUTMAN: I renew my objection.

THE COURT: Overruled.

A That is correct.

Q When is the next time you spoke with Mr. Ryan about this questions of your account?

A If we are in, say, the first of 1967, that would probably be a good date, he may have called me several times in 1967, early '68, to say that occasionally he was in contact with Newburger, Loeb because they called him to see if I was more able to pay then than I had in the previous call.

He would call to report to me the fact that no, Mr. Buckley is not able to do anything more for the account.

Q And you did have in that interim period that one meeting, did you not, you and Mr. Ryan and Morris Newburger and Leo Stern?

A I remember when Mr. Stern was there. Mr Morris Newburger may have been there. It was in that three or four=year period, Mr. Mandel.

As I said the other day, I can't tell you when the meeting was.

Q Again, you did not say to them that anything had been done wrong in your account?

A That is correct.

Q And you didn't say you had been churned; is that correct?

A That is correct.

Q And Ryan didn't say you had been churned?

A That is correct.

Q And you didn't say, "Old Charlie Jordon kept me from selling Westec at the last moment"?

A That is correct.

Q And Mr. Ryan didn't say that?

A That is correct.

Q Did you tell Mr. Ryan about that Wichita call?

A I discuss the ending time of my account with him. I don't recall whether or not we got into that specific. I don't recall.

Q That was a very important call to you, wasn't it?

MR. GRUTMAN: Objection.

THE COURT: Overruled.

A It was a very traumatic call to me, yes.

Q According to your testimony, if I understand it correctly, before you called Jordon, you were thinking of possibly selling out all of your Westec; is that right?

A I had already sold some from Merrill Lynch.

Q Answer my question.

MR. GRUTMAN: I object. That is an answer.

Q You were thinking of possibly selling all of your Westec; is that correct?

A That is correct

Q And you called to get Mr. Jordon's opinion on the matter, is that correct?

A No. I believe I said I called him to tell him that I wanted to sell it.

Q You called to place the order?

A Pardon?

Q You called to place an order; is that your testimony?

A An order to sell, not buy.

Q You called to place an order to sell; is that your testimony?

A Yes.

Q Let me get back to this: Had you spoken to Merrill Lynch the same day?

A No, I had not.

Q The day before?

A I have my records. It was three or four days before that I sold the 500 shares.

Q Why didn't you sejl your Merrill Lynch? Who stopped you from selling your 2500 sahres of WEstec at Merrill Lynch?

A I don't remember the context of selling 500 and not 2500, so I can't tell.

Q Did you hear Mr. Grutman say, at any time while you were in the courtroom, that Mr.Jordon refused to accept your direction to sell the stock?

MR. GRUTMAN: I object to the form of the question.

THE COURT: Yes, sustained.

Q Do you say now, sitting here in the courtroom today that you called Mr. Jrdon and instructed him to sell the stock and he refused to do it?

MR. SHAW: Objection to form.

THE COURT: Overruled.

A I believe it is in my testimony already, Mr. Mandel, that I called Mr.Jordon to say that I wanted to sell the stock and that after the conversation in the testimony he dissuaded me from doing it.

Q You changed your mind?

MR. SHAW: Objection.

THE COURT: Overruled.

MR. SHAW: He is arguing with the witness. He says "dissuaded," and "changed his mind."

MR. GRUTMAN: The question is, who changed his mind?

MR. SHAW: And how did he do it.

THE COURT: The question is, we are going to the differences of intent and the objection is overruled.

A He dissuaded me, and you said did Mr. Jordon change my mind.

Q Did you change your mind?

A Yes, I changed my mind.

Q Was it based on force of personality or certain information?

A It was based on certain information and Mr. Jordon's a good salesman. If that is force of personality, okay.

Q He wasn't selling anything at the moment.

MR. SHAW: Objection, your Honor.

THE COURT: We are getting down to very little niceties here.

I will sustain this objection.

Q Actually, I put it to you that what happened is that you were in a quandary?

MR. SHAW: This is going to be an argument in the prsence of the jury. It's bad for form. It's not a question, it's a speech, and I object.

THE COURT: There is no foundation for the quandary, is there?

MR. MANDEL: I will rephrase it.

Q You had testified on direct about the operation of your mind immediately before, you made this telephone call, did you not?

A Yes.

Q You had heard bad things about this stock; is that correct?

A That is correct.

Q At the moment you had an indicated profit of about half a million dollars in that stock; is that correct?

A No, that is not really correct.

Q What do you say your indicated profit was?

A An average price of 11, I think that number has been used, and the stock was trading at 45; that is 34 times 11.3 Mr. Jordon had, so that's about $375,000 paper profit.

Q Every point the stock went up would be $11,300 and you were aware of that?

A Yes.

Q And the stock had gone up and down on different occasion while you held it; is that correct?

A It must have gone up and down on different occasions, yes.

Q Isn't it also fair to say that while your investment, that $100,000 investment, was moving over the months up to a $400,000 or $500,000 investment, there were many times when you wondered whether this was the moment to sell or not?

A I could answer that with absolutely no certitude at all, there were many times this was the moment to sell. I don't remember going through those many times.

Q Sometimes?

A Certainly in the sixties.

Q During the period you held that stock, if it was going up, didn't you discuss it periodically with Jordon, "Should I sell now"?

A No. It was more a discussion of, "Gee, the stock looks good, doesn't it."

Q So there was never a time, and is this your testimony, before the Wichita call, when you asked Jordon whether you should sell or not?

MR. SHAW: Objection. That is not the

testimony.

THE COURT: Overruled.

MR. GRUTMAN: Sell or sell out, Judge.

THE COURT: Overruled.

A We just said the other side of that. Now you are back with a "never." Just a few minutes ago you said were there many times did I think about selling, and your description was sometimes, and I said there were sometimes certainly in the sixties.

Q When you thought about selling?

A Yes.

Q And when you had those thoughts, did you discuss them with Jordon?

A I don't remember that, Mr. Mandel.

Q You don't remember one way or the other?

A No.

Q As you sit here today, can you remember any conversation with Jordon about whether you should sell Westec except the one you have testified about?

A Yes, I do. When the stock was in the sixties, my recollection was sometime in the summer of 1966, say July for talking purposes, the stock started to fall precipitously.

We talked the other day about volatility of the stock, and I said in my opinion it was not volatile, meaning rapid ups and downs.

It was pretty much up until it got to the sixties, and then it dropped off to 45 in mid-August or the latter ten days of August.

I asked Mr. Jordon during that period of time as to why the stock was going down, and might this be a time for selling, and my reference fram being in the 60's.

Q You were asking for his opinion?

A Yes, I was.

Q We can be clear about this, too, that he didn't call you in Wichita, you called him from Wichita to find out what he thought; is that correct?

MR. GRUTMAN: That is not his testimony.

THE COURT: I just sustained the objection.

MR. MANDEL: This is cross, your Honor.

THE COURT: We have been a number of times into what the substance of the call was.

Q Do you remember that you testified last week under Mr. Grutman's questioning about the Wichita call and that you said that Jordon told you if you sold the stock you had such a big block the market would break; is that what you testified to?

A In essence, yes. I testified to that and other things, ye. But I did testify to that, yes.

Q Why would you care if the market broke? If you sold out, you would get yours, it would be a point or two lower or higher. Why would that dissuade you from selling?

A Mr. Jordon's point, as I interpreted, if I put a sell order in for my 11,300 at 50, the market might break under that one sell order, and it might not be executed for several points, so I would suffer the loss for mine besides other people.

Q Were you familiar with the volume of trading at Westec at that time?

A Yes, I was.

Q About how many shares were trading a day?

A You are talking August?

Q Yes.

A About 50,000 shares a day.

Q You were watching it like a hawk?

A I watched it --

MR. SHAW: Objection.

THE COURT: Sustained as to form.

Q You were watching it with the utmost of care and concern, were you not?

A Yes, I was.

Q You weren't too naive by that moment to know that the volume of trading in Westec was very important to you?

MR. SHAW: Objection, your Honor.

THE COURT: Take out the word "naive," will you please.

Q You were sufficiently experienced by that moment in time, were you not, to be aware that the volume of trading in Westec was quite important to you in your position?

A Mr. Jordon told me it was, yes. Yes, I was aware.

Q You and I spoke before, and we took your deposition on June 11th of 1971; is that correct?

A That is correct, Mr. Mandel.

Q That was four years ago, is that correct?

A Yes, sir.

Q And I guess you would agree with me that at that period, that moment of time was closer to the actual events than this moment in time?

A Yes, Mr. Mandel.

Q It is true, is it not, that you have been studying and reading your deposition in preparation for testimony in the last few days?

A I have read it, yes, I have.

Q And when I asked you in 1971 about the Wichita conversation, didn't you tell me this, going to page 64 now, I said August of '66, and you said this, and I am going to read your words, and correct me if I slip and omit or add one word --

MR. SHAW: We should have the question preceding this.

MR. MANDEL: Let me do it.

Q Your answer was, "Yes, I also had a smaller amount" --

MR. GRUTMAN: An answer is taken totally out of context. It stands on nothing. There has to be a question.

MR. SHAW: If your Honor reads from line 10 on page 63, the preceding question, you will see how the context is important here.

MR. MANDEL: Let anybody who wants tell me where to start.

MR. SHAW: Line 10, page 63.

THE COURT: I will pick it up at line 2, page 64 with the question.

Read the question, please.

Q I said, "August of 1966?" And you said this: Yes. I also had a smaller amount of Westec stock at Merrill Lynch, 3,000 shares to be precise. I instructed them to sell 500 shares of it based upon what this man's comments were and also based on some of the fluctuations in the stock that continued to go on, and these being more on the down side, as I recall, in the 60's, down to the 40's, and I called Mr. Jordan, from Wichita, Kansas and asked him what the latestinformation was, and he said he just talked to the PR gal down in Wichita and the information on the copper mine down in South America, I believe Chile, was very, very favorable, and the initial investigations were very favorable, and that in his opinion somebody was trying to drive the price down before this information came out such that they could get it at a lower price and definitely not to sell.

"Q When was this?

"A Shortly before the cessation of trading, on waht precise date I don't recall, but it was not too much before.

Q This was at a time when you were in Wichita?

A I was on what we call a field trip to Wichita, Kansas."

I will stop here, Mr. Buckley, and ask you whether it is not correct that in this account of the conversation you told me in '71 that you called Jordon to ask him for information and that you did not say to him "I have made up my mind to sell"?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A In this deposition in 1971, I think the phrasing is precise. He persuaded me definitely not to sell based on this information that he gave --

THE COURT: No. Please read the question back.

(Question read)

(Recess)

(In open court - jury present)

A It is not correct. I believe your question was phrased in the context of was it not correct.

Q After Westec closed down, there w as a big scandel in the newspapers, wasn't there?

A Yes, it was.

Q It was one of the great financial causes celebres of the year, wasn't it?

A I don't follow causes celebres. It was in my mind, yes.

Q You read newspaper articles about the Westec debacle?

A Yes, I did.

Q And you read articles in the Wall Street Journal about the Westec debacle?

A Yes, I did.

Q Did you read articles about the Westec debacle in financial publications?

A The Wall Street Journal, New York Times.

Q You were very interested in it because though trading was suspended, there was still a living entity and you had a lot of stock in it; is that correct?

A That's correct.

Q And it is true that you found out from your reading that it was a big swindle committed by some fellows named Hall and Williams, who controlled the company; is that correct?

A That is correct.

Q And they involved -- or it involved millions of dollars of losses for many people in Wall Street; is that correct?

A You say losses --

Q Losses.

A Yes.

Q And Hall and Williams went to jail?

A I don't know that.

Q But you do remember that up and down the corners of Wall Street there were many victims like yourself; is that correct?

MR. GRUTMAN: That is argumentative.

THE COURT: I think he already answered it. I will sustain the objection.

Q All this came out in 1966 and 1967, didn't it?

A I believe there was still commentaries from time to time, yes.

Q But in 1966 and 1967 even after consulting Ryan and reading these articles and everything else, you still didn't call Jordon and say, "Charlie, you did something wrong"?

A That is correct.

Q And you didn't say to Newburger, Lobe, Jordon did something wrong?

A That is correct.

Q And you didn't say that in '68 either?

MR. GRUTMAN: This is repetitious. We have had that several times, your HOnor.

THE COURT: I believe we have.

Sustained.

MR. MANDEL: I will move on.

Q And you never, to this day, have made a claim against Jordan and/or Gross?

MR. SHAW: Objection.

THE COURT: That has been testified to before also.

Q I am going to your testimony and deposition given in June 1971, page 68, line 20, and I asked you this question:

"Let me get back to the question of Westec. Do you now believe"--

MR. SHAW: Did you say '68?

MR. MANDEL: 68. Excuse me.

Q "Let me get back to the question of Westec. Do you now believe -- I am asking for your belief -- that Jordon did something wrong when he advised you to buy Westec?

"A When he advised me to buy it, no. Do I believe he did something wrong, no."

Is that still your opinion, that he did nothing wrong when he advised you to buy Westec?

A That is my opinion, yes.

Q "Q During the year and a half you held Westec, were there frequent discussions between you and Jordon about whether you should buy more or sell some?

"A As I said before, I believe at sometime during that period of time, we were buying more. When we stopped, I don't remember.

"Whether there were discussions on whether we should buy more or sell some, I just don't recall."

Is that still your answer?

A If you asked the qauestion today, I guess I would have to ask you to be more precise than the year and a half. I testified before that I bought it in July of '64 so it was a little more than two years, and I had sold some.

Going back to this deposition, I would conclude that you were talking about the most recent year and a half leading to the close-down.

Q Let me go on with your questions and answers:

"Q But there was a year and a half during which there were some sales and during that same period there were some purchases?

"A Right, that the account by and large was definitely on the long side to a considerable degree.

"Q You were accumulating more as time went on?

"A Correct.

"Q Your purchases exceeded your sales in number of shares?

"A Very definitely.

"Q But you stopped buying at 14?

"A As I recall.

"Q And rode all the way to 60?

"A Right.

"Q There came a time when I suppose you recognized you had $600,000 or $700,000 invested in Westec; is that correct?

"A I didn't have $600,000 or $700,000 invested in Westec. I had stock worth $600,000 or $700,000 of Westec, but also owed a considerable margin balance, which diluted the equity."

Did you give that answer?

A Yes.

Q Was that answer correct?

A Yes.

Q And it's still correct?

A Yes.

Q And I said:

"Q You were right and I was wrong. You had a $600,000 or $700,000 position in Westec.

"A That's correct."

Was that your answer?

A Yes.

Q So you did have a $600,000 or $700,000 position in Westec?

A Yes.

MR. GRUTMAN: I must object. I fail to see where this is leading to.

As I understand, use of depositions is for impeaching purposes, and there has been o inconsistency or contradition.

THE COURT: Where there is or is not is for the jury to determine.

At this point I will overrule the objection.

Q "That position in Westec represented more than your total net worth, I suppose."

And you answered, "Considerably more."

"Q You were naturally quite interested and perhaps concerned with what you ought to do about those very large indicates profits; is that correct?

"A That is correct.

"Q Am I right in saying that you began to think about whether you should sell Westec long before it reached 60?

"A "Long before" is a relative thing, but yes."

Was that your answer?

A Yes.

Q Was it correct?

A Yes.

Q Then I said:

"Q Let's put it another way: When Westec reached

20, did it occur to you that perhaps you should sell it?

A As I said before, I think I sold some around 10, so obviously yes."

Was that correct?

A Yes, it was.

Q Going on:

"Q In other words, wouldn't it be fair for me to say that at least after the stock hit 10, every week and every month, if not every day, you were confronted with the question of whether it wouldn't be wise to sell all or some of that stock?

"A Every day is a little over doing it. Yes, the item was very much on my mind with that much of a position."

Did you give that answer?

A Yes, sir.

Q Then I said:

"Q It is entirely fair to say, is it not, at least by the time that Westec was in the 20's and 30's, it was very volatile; is that correct?

"A As I recall, yes.

"Q And its price did not seem to bear in any conservative relationship to its earnings, isn't that correct?

"A As it turned out, to its real earnings.

"Q Never mind the real earnings, the reported earnings."

And didn't you say then:

"Whatever they call it, the ratio is pretty high if that is what you mean by your question. Yes, I guess you are right."

Was that your answer?

A Yes, it was.

Q Then I said to you, did I not:

"Q You were aware at all times of the price earnings ratio of Westec?

"A I would hardly say I was aware of it at all times. It seemed to be higher than what would be a conservative position of the company.

"Q To be brutally frank about it, you knew and you intended that the Westec situation was a speculation?

"A That is correct."

Did you give that answer?

A Yes, I did.

Q Is that true today?

A Yes.

Q It is true that at all times you knew and intended Westec was a wild speculation?

MR. SHAW: Objection.

MR. GRUTMAN: Same objection.

Q You can answer yes or no.

THE COURT: "Wild" --

MR. MANDEL: He can say no. I am entitled to ask him that.

THE COURT: Sustained.

BY MR. MANDEL:

Q Then I went on to say:

"Q In fact" --

MR. GRUTMAN: I object to "Then I went on to say," and "You went on to say."

THE COURT: It is better for the reporter if you said "Question" and "Answer."

Q "Q In fact, like Syntex it was one of the well known and volatile speculations of that era; is that right?

"A Of that era, I think Syntex was going on for a considerably longer period of time than Westec was. If you mean within that year or two, I guess it's right."

Did you give that answer?

Q Yes, I did.

"Q "Q you were trading in Syntex within a year or two at the same time?

"A That is right.

"Q Which was another speculation?

"A Yes."

Did I ask those questions, and did you give those answers?

A Yes.

Q Do you still stick to those answers?

A To the intent of them. I really don't know what you meant by the first question, now that I reread it again, but okay, I think I know what you mean.

Q "Q I take it that you consulted with Jordon and Jordon consulted with you periodically about whether it would be wise to sell or buy some Westec?

"A I think that is a reasonable assumption."

MR. SHAW: I object at this point. We are practically having the entire deposition read into evidence at this point. Many of these questions are improper, they are not contradictory.

This is not for the purpose of impeaching.

THE COURT: You argued that, and I suppose it might be argued the other way.

I overrule the objection.

Come up here.

false impression that there is inconsistency? Where there is none, I have no objection.

THE COURT: This is a question for you lawyers to argue at a later time.

The objection is overruled. I want you to understand that there are earlier questions upon which this bears, and there might be inconsistency.

MR. SHAW: I have no quarrel with that.

THE COURT: It's a question for the jury to decide and for you to argue.

The objection is overruled, Mr. Mandel.

(In open court; jury present)

THE COURT: Were you asked that question and did you give that answer?

THE WITNESS: Yes.

BY MR. MANDEL:

Q "Q Do you recall?

"A I can only conclude I must have, with a position that large. I would have been foolish not to, but my kind" --

MR. SAHW: I'm sure that means "mind."

MR. MANDEL: I can only read what is here.

Q "My kind doesn't work that way. Do I sit down and talk with somebody about a stock once a day or a week or whatever the occasion may be? I imagine we had conversations about it."

"Q Was there an occasion when he told you to buy Western Equities when you did not want to?

"A I don't know the answer.

"Q When you had that large position you invested Western Equities in other ways other than by asking Jordon questions; isn't that correct?

"A I asked questions of my acquaintance at Merrill Lynch whether they thought of it, and it was just a wild speculation, not printed reports, if that is what you mean."

Did you give that answer?

A Yes, but like the "kind" in mind, I thought it was and it was just like a wild speculation should be -- and was it just a wild speculation. In other words, my answer to you is in the framework of what my questions were and not what their answers were.

Q I will ask you now, didn't your friends at Merrill Lynch tell you it was a wild speculation?

A I don't remember.

THE COURT: Mr. Mandel, where are we going here, that is, in terms of applicability to this case? If I read on here, do you contend that this is necessary to part of this examination?

MR. MANDEL: Yes, I would say close to the bottom of page 75.

Q "Q Did you ask anybody else?

"A The second part I think I referenced before when the earnings reports came out.

"Q Which firm was that? Did you name the firm?

A No."

Then I skip a few inconclusive questions --

MR. GRUTMAN: I object to his characterization.

MR. MANDEL: I will read them.

THE COURT: Just omit them, please.

MR. MANDEL: I am omitting questions and colloquy."

Q "Q The third one is in a stock brokerage firm?

"A No, an investment advisory firm.

"Q You spoke to him about it?

"A When the 1965 earnings report came out and he said he would take it home and look at it or read it on the train and give me a call.

"Q Then what happened?

"A He said he thought the balance sheet looked very, very suspicious, and he would be very much concerned about maintaining a position in the stock. That is as the summer started to go.

"Q And you still did not sell any?

"A That is when I started to question Mr. Jordon.

"Q The stock was then 50, down from 60, roughly, or 40?

"A I think it was still on its way up to 60, as I recall, because it wasn't really until August --

"Q That it began to move down?

"A Yes."

Having heard those questions and those answers, I will ask you again, Mr. Buckley, isn't it true that you were in communication with Mr. Jordon from time to time periodically throughout the spring and early summer of 1966 both of you discussing what should be done with your large position in Westec?

A I lost the frame of your question. Isn't it true?

Q Yes.

A It is true that I discussed with Mr. Jordon what should be done with my WEstec stock after Mr. Clancy gave me his comments about the balance sheet. That was not the spring, it was in the summer. And after the stock hit the 60's and started to go down into the 40's, those times were roughly concurrent, as I testified before, and I believe some of your questions and answers revealed.

Q You had conversations back and forth on a number of occasions with Jordon about that?

A Yes.

Q And you and Jordon were talking to each other how many times a day at this time?

A At this point in time, five or six times day.

Q Is it fair to say that you discussed the Westec at least once every day in connection with these five or six calls?

A On average, yes.

Q By the way, while Mr. Jordon was making all these calls to you and you were making all these calls to him, was he constantly pressing you with suggestions to buy more stick?

A More stock -- you mean stock in Westec?

Q More stock in general.

A My impression was yes.

Q Is that true for the entire period when you are talking about all the calls, that most of these calls were suggestions that you buy stock?

A Or sell to raise funds to buy, yes.

Q Most of the calls were suggestions to buy or sell?

A Buy or sell, yes.

Q Most of the times you neither bought nor sold after a telephone conversation, isn't that right?

A Most of the times. This is 1966. I had 31 transactions in 1966. The stock looked --

Q Let's stop there. 31 transactions and how many telephone calls?

A That is what I was getting to. We just said 5 or 6 a day. That would be 35 a week, 140 a month, 840 in a six-month period, resulting in 31 transactions.

Q How many suggestions to buy or sell out of the 840 calls, 500?

A I wouldn't have the least recollection.

Q You just said most of the calls involved a suggestion to buy or sell?

A Yes.

Q Would you say more that half of the calls involved a suggestion to buy or sell?

A Yes.

Q So that how many total calls were there, you say?

A Five or six a day.

Q How many for the year?

Q 140 a month; that would be 840 for the six-month

month period ending July 31st.

Q If there were 840 calls and half of them were suggestions to buy or sell and you bought 40, you said no nine times and yes once; is that right?

MR. GRUTMAN: That is a numbers game and purely argumentative.

THE COURT: I wi-l overrule it.

A I didn't follow, the last part.

Q If there were 800 calls and four or five hundred of those calls contained a suggestion to buy or sell, and you actually only had 41 transactions or 31 transactions, then 10 times you said no and once you said yes?

A Using those numbers which are based on my numbers, yes.

Q You are the witness.

A Yes, I know.

Q Is the same thing true of the subsequent years?

A There are no subsequent years. There are preceding years with 500 transactions and 200, several times.

Q What was the "no" ratio to the "yes" ratio in 1965?

A '65, we weren't talking '65. We were in '66. '65, my earlier testimony had been that near the end of the period we were averaging five, six calls a day. Let's use five. If you want to use the whole year, based on five, you double the 800, 1600, eight to one for that period, 1965.

Q You said no eight times for every time you said yes for a suggestion of a transaction?

A For every time a purchase or sale is made, yes.

Q Okay. How about '64?

A '64, using the same numbers for calls in '65, would be about three to one.

Q We don't have to go into '62, do we?

Even when you said yes, you knew you could say no?

A Yes.

MR. GRUTMAN: We had that, right?

THE WITNESS: Right.

Can I say something or no?

Q Why don't you just answer my questions.

MR.GRUTMAN: If the witness feels there is something necessary to explain an answer --

THE COURT: There is no question pending. If he wants to discuss with Mr. Shaw his point later and see whether it's something Mr. Shaw wants to bring out, I will permit him to do that.

Make a note to yourself, and you and Mr. Shaw can discuss this.

BY MR. MANDEL:

Q Did there come a time when you bought any Crucible Steel between 1962 and 1966?

MR. GRUTMAN: This is not proper recross. There wasn't a question about Crucible Steel in my cross-examination or in Mr. Shaw's examination.

MR. SHAW: I join in that objection.

THE COURT: I don't know what this bears upon. What item is this?

MR. MANDEL: Mr. Buckley said he was too busy to originate ideas. I now propose to go through a list of suggestions --

THE COURT: It bears upon that testimony?

MR. MANDEL: Yes.

THE COURT: Go ahead.

Q Did there come a time between 1962 and 1966 when you bought any Crucible Steel?

A If I can consult my records, I could tell you. I don't recall buying Crucible Steel, certainly not through Mr. Jordon.

Q I will tell you, you bought some in your

Merrill Lynch account in February of 1963.

Will you accept that?

A Yes.

Q Whose suggestion was that?

A I don't have the least idea.

Q Didn't you say that the people at Merrill Lynch never made suggestions; you told them what to do?

A That was with regard to stocks that I called them with orders to buy or sell stocks, the suggestions for which I got from Mr. Jordon.

I don't believe I ever said Merrill Lynch did not make suggestions.

Q Merrill Lynch did make suggestions to you, too?

A I believe so.

Q And you made suggestions to them?

A Yes.

Q Is that right?

A Yes.

Q And that worked the same way with Mr. Jordon, right? He made suggestions to you and you made suggestions to him?

MR. SHAW: Objection.

THE COURT: This is in the record already, isn't it? It's quicker to answer.

A Yes, it is in the testimony, and yes, it is true.

Q What happened to your suggestions to Mr. Jordon?

MR.SHAW: Objection.

THE COURT: I am not going to get back into this again.

MR. MANDEL: All right.

Q You bought Jones & Loughlin Steel in February 1963, didn't you?

A You are reading the records. I accept that.

Q Whos idea was that?

MR. GRUTMAN: May we know what account, Merrill Lynch or from Mr. Jordon?

THE COURT: No.

A I don't remember.

Q You bought Kern County Land Company in 1963. Whose suggestion was that?

A I don't recall.

Q You bought Marymount Corporation in 1963; whose suggestion was that?

A I believe thatwas mine.

Q Continental Airlines in 1963; whose suggestion was that?

A I bought some airline debentures at Merrill

Lynch's suggestion. I don't know whether they were Continental or TWA.

Q Mississippi River Fuel; whose suggestion was that?

A I believe that was theirs.

Q Whose?

A Merrill Lynch.

Q National Airlines; whose suggestion was that?

A I don't remember.

MR. GRUTMAN: I fail to see the relevancy of his dealings with Merrill Lynch. We are concerned with Gross & Company and Jordon, and it's not proper recross.

THE COURT: But it bears upon his knowledge of the field.

MR. MANDEL: In the nature of the investor.

Q Brown Company in 1963; whose suggestion was that?

A I don't recall.

Q Now we come to the Trans World Airlines, units and warrants and debentures, 175,000; whose suggestion was that?

A That was theirs.

Q Whose?

A Merrill Lynch.

Q Holly Sugar; whose suggestion was that?

A I don't recall.

Q Could it have been yours?

A It could have been either parties. Yes, it could have been mine.

Q Penrick & Ford, Ltd.; whose suggestion?

A I don't recall.

Q It could have been yours?

A Yes.

Q Atlantic Refining; whose suggestion was that?

A That was theirs.

Q Whose?

A Merrill Lynch.

Q Hess Oil; whose suggestion was that?

A I don't recall.

Q It could have been yours?

A It could have been mine.

Q Prairie Oil royalty; whose suggest was that?

MR. GRUTMAN: I object to the question, "could it have been," because that has no probative value.

MR. MANDEL: It's an admission.

MR. GRUTMAN: That is not an admission, and I object to such a comment by counsel.

THE COURT: I have been treating that as an answer which is, "I am not prepared to say whether it was theirs or whether it was mine."

On that basis I have been permitting it to come in.

Your point is well-taken, but I will allow it, given that definition.

Q McClain Industry A; do you remember buying that?

A Yes.

Q Was it your thought?

A That was theirs.

Q Merrill Lynch?

A Yes.

Q Something -- I think Technical Animations, Inc., is that right?

A I don't remember the suggestion or the stock.

Q What?

A I remember neither the suggestion nor the stock.

Q You bought some Rank, American Depository receipts. Do you remember whose idea that was?

A That was theirs.

Q Merrill Lynch?

A Yes.

Q Do you recall that you bought it in Merrill Lynch's account in 6/13/63, and then you bought some in the Newburger, Loeb account on 11/13/63?

A I believe you. I don't recall.

Q Parke Davis; how about that?

A I couldn't say. I don't recall.

Q You don't know whether it was your suggestion or Merrill Lynch's?

A That is correct.

Q Do you recall that you bought some in the Merrill Lynch account on 10/25 --

MR. SHAW: Can we have the year?

MR. MANDEL: You got me.

MR. SHAW: I object at this point. It seems to me we have an awful lot of transactions occurring in the year 1963, but none of the other dates are given.

I think it is relevant as to in what year these transactions that Mr. Buckly's suggestions were made. So far I haven't been objecting because it's "could have been" or "might have been."

But the years are not given.

THE COURT: I understand we had the years established.

MR. MANDEL: Let me run back. It's on a piece of paper here. Maybe we should just offer it in evidence if Mr. Buckley will confirm it as seemingly accurate and that he can understand it.

MR. GRUTMAN: It's made by Mr. Mandel and without anything further, I object to it.

THE COURT: Mr. Mandel, is this a document you prepared[illegible]

MR. MANDEL: Mr. Rothman prepared it.

THE COURT: I would deem it inadmissible, then.

MR. MANDEL: I am not insistent. Obviously I don't have the right to put it into evidence. I have the right to offer it to save time, if the parties will stipulate.

MR. SHAW: Objection.

MR. GRUTMAN: Please, Mr. Mandel.

Q Penick & Ford was '64, right?

A I don't know, Mr. Mandel.

Q Atlantic Refining was in 1964. Commonwealth Satellite or Communications Satellite, '64?

MR. SHAW: I object. This is an indirect way of accomplishing the same thing, asking these questions over and over again.

The witness has no recollection of them, and the mere asking of a question establishes or has a tendency to establish the fact, and I submit it's improper.

THE COURT: I take it you remember purchasing the stock in these cases?

THE WITNESS: Except for that Technical Applications.

THE COURT: You don't remember where the suggestion came from?

THE WITNESS: In some cases I do remember.

THE COURT: In others you don't.

THE WITNESS: Bight.

THE COURT: All right.

BY MR. MANDEL:

Q Do you recall -- or we spoke about Parke, Davis.

Occidental Petroleum, do you remember buying that in 1964?

A No, I don't.

Q You don't remember it at all?

A No, nor the source.

Q Will you accept my --

MR. SAHW: Objection.

MR. MANDEL: All right.

Q How about Redcore in '65?

A Yes, I do.

Q Whose idea was that?

A Mr. Jordan's.

Q You bought it first in Merrill Lynch?

A I bought it in Merrill Lynch; whether first or second, I don't recall.

Q How about Mohawk Data Sciences?

A Mr. Jordon's.

Q Baird Atomic?

A Merrill Lynch.

Q You bought that in both accounts, too; do you recall that?

A No, I don't.

Q Cambridge Nuclear?

A Mr. Jordon.

Q You bought that in your Merrill Lynch account as well?

A If you say so.

Q How about Smith Doublas?

A Mine.

Q Your suggestion?

A Yes. I made money.

Q Congratulations.

A I accept that.

Q You bought some calls on Georgia Pacific in 1965. Whose idea was that?

A Assuming that I did, they are mine.

Q Even though it was done in the Newburger, Loeb account?

A Yes.

Q Do you remember you got some stock dividends on your Georgia Pacific?

A I don't remember.

Q But you counted them as transactions?

A No, I did not. I would count the sale of a stock received as a stock dividend as a transaction, not the receipt.

Q Do you recall selling some of your stock dividends out of Newburger?

A I sold everything out of Newburger, Loeb I was left with. If I was left with it, I sold it.

Q Now I would like to get with you on the question of calls.

MR. GRUTMAN: Couldn't Mr. Mandel put questions without the roadmap of his mind?

Q When for the first time did anybody indicate to you that you bought or sold calls from Mr. Jordon?

A The first time about Wednesday or Thursday of last week.

Q Who told you that?

A One of the attorneys, Mr. Grutman or Mr. Shaw;

I don't recall.

Q Do you of your own knowledge know whether it is true?

A I know that the statement says it. I don't remember -- if the statement is true, I know it's true.

Q You know that the statement has the word "Jordon" on it?

A I know the statement has "C. Jordon" on it.

Q But you don't know why it's there, do you?

A Yes, I think I do.

Q Because Mr. Grutman and Mr. Shaw explained it to you?

A That is not the case.

Q You explain your understanding.

A When there are calls that I purchased and that are then repeated on the monthly statements, Newburger, Loeb's practice was to list the selling house or the selling person.

In some instances there is the name Cohn listed there, which I assume is Cohn,Ivers, which I read in the papers is out of business.

When I see in the papers "C. Jordon," that is similarly the selling house in each instance.

Q Is the first time you come to that thought, is that correct -- the first time you came to that thought was this week?

A That is not right. The first time this week that Mr. Jordan's name is involved. It's not the first time that the name listed is the selling house.

Q We will see --

MR. SHAW: Objection to any statement by Mr. Mandel. That is not a question, your Honor.

MR. GRUTMAN: I object to Mr. Mandel's gesticulations and head wagging and other grimaces and leers.

THE COURT: Gentlemen, please. I want to minimize this. I want no laughter among counsel. I want no observations.

Go ahead.

MR. MANDEL: May I say something?

THE COURT: No. You may pose questions.

MR. MANDEL: All right.

Q I am showing you Exhibit B, and I think you testified this morning about a specific call transaction which you said you bought or sold from Jordon; is that correct? Would you see if you can find that on sheet No. 2? Can you help me identify this? It's the statement of July 3, 1963, and the W. Buckley account; and will you show me where the name Jordon appears here?

A Assuming this is a replica of the sheet I read this morning, there is a similar entry of June 28th, 300-share call in Technical Operation at 19-7/8, expiores 7/1/63. It says "C. Jordon," under the price column.

A Yes.

Q I am showing you something taken from your confirmation slips. Would you read this over? Really, you know more about it than I do.

A I am in difficulty.

Q You look at it.

MR. SHAW: If there is some question with respect to a document not in evidence and there is going to be testimony, I would like it marked, and I would like to see it.

THE COURT: Mark it for identification. Ask the witness if that is his confirmation slip, and we will put it in evidence.

* * (Defendant's Exhibit G marked for identification.)

Q Will you study Exhibit G for identification and see if you know what it is?

A There are three Newburger, Loeb confirmation slips and a fourth slip from a firm of Cohn, Ivers & Company.

I don't know what the latter is.

The first three are confirmation slips.

Q Will you look at the paper --

THE COURT: Will you offer it in evidence?

MR. MANDEL: Yes.

THE COURT: Show it to the other side.

Is there any objection based on the authenticity of these documents?

MR. SHAW: We have never seen them. We are taking a minute to look at them, because it's a little complicated.

I have looked at them, your Honor.

THE COURT: Do you have an objection on the grounds of authentiticy or any other legal objection?

MR. SHAW: As of this point, there is no foundation, and I object to the documents in evidence.

THE COURT: They are yours?

THE WITNESS: They are mine.

THE COURT: The objection is overruled.

(Defendant's Exhibit G for identification was received in evidence.)

MR. SHAW: Why is that being separated?

THE COURT: You can't get to the back of the sheet.

MR. MANDEL: It can't be read while it is folded, Mr. Shaw.

BY MR. MANDEL:

Q Will you look at the first page of Exhibit G and see if you know what it is?

A I can read it. It's a form I am not familiar with, from Cohn, Ivers & Company, addressed to me, dated 6/27/63: "We have repurchased from you" -- that being typed in -- "the following stock option: Call on 300 shares of Technical Operations, Inc. to 19-7/8, expiring 7/1/63," and then a contract number and a price of $3212.04.

MR. SHAW: Could that document be reassembled at this point?

THE COURT: The exhibit is accurate, and it will be put together.

Q I now show you a confirmation which is part of Exhibit G and see if you know what that is.

A It's a confirmation slip of a purchase, I believe, yes.

Q It is a confirmation of a purchase of a call, is it not?

A Right, of a call.

Q And it's the same call that we were talking about, is it not?

A It reads the same. Whether there are other 300-share calls expiring on the same date, I don't know.

Q You see if you can find it. On the face of it it's the same call?

MR. GRUTMAN: I object to that.

THE COURT: I sustain the objection.

MR. GRUTMAN: There is a "C. Jordon" in there.

THE COURT: Objection sustained.

Q In Exhibit B, you read next to Jordon's name, "Call June 28, 1963, 300 Technical Operations at 19-7/8, expires 7/1/63,"and this says, "Calls on 300 Technical Operations, Inc., 19.875, expires 7/1/63."

Is that correct?

A That is correct.

Q It says from whom received, and that isConn, Ivers & Company, Inc.,; is that correct?

A Yes.

Q Do you recognize the handwriting?

A It's my handwriting.

Q It's your handwriting on the piece of paper?

A That is correct.

Q Are you prepared to say that the transaction on this part of Exhibit G is the same as the transaction that we have been looking at?

A I am not prepared to say. The date is different.

Q The expiration date is the same?

A The purchase date. The expiration date is the same, yes.

THE COURT: Can you identify the page of Exhibit B you are referring to?

MR. MANDEL: It's listed on the bottom as 00221 of Exhibit B.

Q I now show you a red sheet and ask if you know what that is.

A I believe it's the recording of a sale. I don't know that it's a sale. There are no dollars written in. I don't know that.

Q Here is the recording of the sale for the same transaction, is it not?

A I assume so, because there is an amount credited. It doesn't say "sale."

Q Simultaneously, we are reaching for something, simultaneously there is a sale of a call back to Cohn, Ivers & Company, Inc.

Do you agree with that?

A I really can't tell from this. The date is

July 9th, and yet the other is expired on July 1st.

Q Look at the one with Jordon's name on it and put them all together and see if you won't agree with me that what these papers represent is this: You bought a call from Cohn, Ivers & Company and the time came when the call had some value, but something had to be done about it, and it was going to be sold back to Cohn, Ivers or something of that nature, and it was physically delivered to Jordon to handle that matter for you.

Look at the papers and think it over and tell me if that is not what really happened here.

Am I being clear?

A You are being clear. I can't tell from the papers that that is what happened, but let me go through them.

Q All right.

A Mr. Mandel, yes, that is because of the statements on the bottom of the Cohn, Ivers slip, the first one we were looking at.

Q So do you now believe you were mistaken when you testified that you were buying calls from Jordon without knowing it?

A I believe I testified on this particular entry that Mr. Jordon's name was entered into it, and that it was a purchase.

We didn't have these. It was a purchase entry.

Q Your present knowledge is that you bought that call from Cohn, Ivers and Jordon's name was only on it because he did something for you, he took physical possession and handled the delivery or something of that nature?

A Evidently, yes.

THE COURT: We are going to take our midday recess.

Two o'clock, ladies and gentlemen.

MR. GRUTMAN: We had no anticipation of the length of this --

THE COURT: Ladies and gentlemen, you are in recess.

(Jury left the courtroom.)

THE COURT: Mr. Grutman, you made some representation that you knew as a fact where the said C. Jordon on these exhibits, that that meant there was trading with Jordon.

MR. GRUTMAN: To the best of my knowledge, yes.

THE COURT: Given what this witness said, what was the basis of your representation?

to identify this now.

Do you offer that package of exhibits in evidence?

MR. MANDEL: Yes.

THE COURT: Any objection?

MR. SHAW: Same objection.

THE COURT: Overruled.

* (Defendant's Exhibit K for identification received in evidence.)

MR. SHAW: I can't find the Syntex document, your Honor.

BY MR. MANDEL:

Q Mr. Buckley, having examined Exhibits H, I, J and K and G, do you wish to change the testimony you gave this morning about your belief that you purchased calls from Mr. Jordon?

A Yes, I do.

Q What is your present understanding and belief of Mr. Jordon's connection with those call transactions?

A Assuming that the confirmation slips we just received, G. H., I and J., are the same as the entries on the statements we reviewed this morning, it would appear that Mr. Jordon was the delivery -- the person to whom the physical calls were delivered, not the person who bought them or sold them to me.

Q And to make that a little clearer, you believe the papers were delivered to him, the certificates to dispose of in accordance with your directions; is that correct?

A Yes, the person to whom they were delivered; yes.

Q When you testified that you were discussing the question of these calls and that they came to your attention for the first time in the last week or two in discussions with some of the attorneys in the case -- is that right?

A Yes, sir.

Q -- was anybody other than attorneys present during those discussions?

A I don't know. I don't recall who was standing there.

Q Was Mr. Risher, the president of Newburger, Loeb & Co., Inc., present?

A I think I said I don't recall.

Q You don't remember?

A No.

Q Where did the discussion take place?

A Either here or out in the hall on this floor.

Q At that time were you shown the ledger sheets which were put into evidence this morning?

A Yes, they are out of my possession. They weren't yours. They must have been those.

Q Who explained those ledgers sheets to you?

A I said this morning it was either Mr. Shaw or Mr. Grutman. I didn't recall.

Q They explained them to you?

A No. They pointed out the Jordon entry.

Q Then what happened? Did somebody suggest to you that that meant Jordon was the seller of the call?

A Not really. No, I don't remember who suggested or whether I expostulated, whatever the word is.

Going down that column as I think we talked this morning, there is the name ofa person who I thought was the selling dealer. Cohn would be listed and Lerner, and when I saw Jordon, I said or agreed to the fact, which I don't know whether I said it or agreed to it --

Q You don't know --

MR. GRUTMAN: May he finish his answer?

A I don't know whether I said it voluntarily or whether I agreed that Charlie Jordon must have been the seller as well as Cohn and Lerner and the balance of the people.

Q I would like to go back to your discussions with Mr. Ryan. I think you said this morning on direct that in 1968 you read an article somewhere on churning and you then took it to Mr. Ryan; is that correct?

A That is correct.

Q Did you have a discussion with Mr. Ryan at that time?

A Yes.

Q At his office?

A I don't recall whether I sent it to him in the mail and we discussed it, or whether I took it to him.

Q What was the substance of the discussion?

A The substance of the discussion was that, as Mr. Ryan knew, I had referred my account problem to him for representation.

Q Your problem at Newburger, Loeb?

MR. GRUTMAN: May he finish the answer?

THE COURT: Yes.

A Yes, my problem with Newburger, Loeb.

And would he again please examine -- or he said, "Could I have your papers so I can take a look at your account. And some period of time elapsed, and I saw this article on churning, and I sent it to Mr. Ryan, and I said, "You know, my account has been very active."

I had prepared this thing by then, this

exhibit by then.

"And do I have any or is there any possibility of churning in this case?"

Mr. Ryan initially treated that discussion and any other discussion for some period of time with me as if I were fairly naieve, if you will, about what churning constituted, and he said, "Look, you're a big boy, you lost some money and you owe it." He said, "There has been very few instances of churning that heavy ever gone through the judicial process, so there is very little case history on them, there is no precedent or rule, no regulation about it, and you are not a little old lady, You are not an idle person. You are expected to represent yourself in investment proceedings, and in effect you're a big boy. You have a loss, stand up for it."

My reaction was, "Fine, my alternative was to go bankrupt."

He said, "However, let me take a look at your papers and your thing, and I will take another look at them and give you an impression."

At some period subsequent to that, and I said I did the clipping in '68, that I really wasn't sure that was the year, so I can't say it was '68 -- subsequent to that we decided to file three counterclaims including churning.

Q You decided to file the counterclaims after Newburger, Loeb brought an arbitration proceeding against you; isn't that correct?

A Time-wise I don't know. There were counterclaims. I assume they were counter to something.

Q They were a response to arbitration?

A That is my recollection, yes.

Q Before that, before the arbitration was started, your attorneys had forwarded a balance sheet of yours and Mrs. Buckley's to the attorneys for Newburger, Loeb & Company, is that correct?

A I don't recall that, Mr. Mandel.

The only one in my file is that one exhibited on the blackboard. If you are talking about something else, I don't recall.

Q I show you Exhibit P-33 in evidence or a copy of it, and ask if that refreshes your recollection.

A Does it refresh my recollection? No. I signed it, but I don't remember the document at all. It's not in my files.

Q You keep your copy and I will keep mine, Mr. Buckley. We will facilitate discussion.

The first page of P-33 is a letter from

Webster, Sheffield, Hitchcock & Brookfield, Mr. Ryan's firm; right?

A Yes, sir.

Q Dated November 26, 1969.

A Right.

Q It's addressed to Mr. Arthur Silverman, Esq., of Golenbock & Barell, 60 East 42nd Street.

THE COURT: Doesn't this exhibit speak for itself?

MR. MANDEL: I would like to read it to the jury. Mr. Buckley says he doesn't remember it.

THE COURT: How does that advance your inquiry of this gentleman at this time?

MR. MANDEL: It forwards a statement signed by him.

THE COURT: You want to ask him questions about the statement?

MR. MANDEL: Yes.

THE COURT: Ask him questions about the statement.

Q You see the second page of P-33 is a certificate signed by yourself and your wife; is that correct? ✓

A Yes.

Q Was that signed about November 26, 1969?

A November 20th, right.

Q It says, "We hereby represent that the attached balance sheet dated November 1, 1969 is a true and complete statement of our financial position as of that date, and we further represent that there have been no material changes in our position to the date of this letter. This information is furnished to you solely for your use in connection with a settlement of claims against us by your client, Newburger, Loeb & Company."

Is that correct?

A Yes.

Q Right?

A Yes.

Q And you signed that?

A Yes, I did.

Q And attached to it is a balance sheet which shows assets and liabilities and an income an expense statement as of November 1, 1969; is that correct?

A That is right.

Q In the asset side it shows 8200 WE at 4; is that correct?

Q What 8200 WE -- does WE refer to Westec?

A Yes.

Q What 8200 shares of Westec does that refer to?

A 8200 shares of Westec that I earlier testified having bought through Mr. Jordon after the reopening of his house, Sheinman, Hockstin & Trotter, or something like that.

Q In other words, in 1969 you bought 8200 shares of Western Equities again?

A Yes.

Q You traded Charles Jordon to his new location?

A Yes.

Q Did you have trouble doing that?

A I believe I merely called Gross & Company or Newburger, Loeb.

Q They told you where you could find Charles Jordon?

A I assume so. I don't know.

Q You came to do business with him, right?

A Yes.

Q And you suggested that you buy the Western Equities at this time; not him?

A I testified earlier I was looking for someone to buy or sell securities for me. I called him and placed an order. There was very little discussion.

Q He advised you not to buy it?

A He didn't advise me one way or the other.

Q You don't recall?

A No.

Q At the same time you were unable to pay your balance, debit balance, to Newburger, Loeb & Company, you were buying more securities?

A November 1, 1969, that is correct.

Q Having investigated churning and having investigated the account in '66 with the outside expert, having tried on the question of churning in 1968 --

MR. SHAW: Objection. This is not a question. It's a summation before the jury.

THE COURT: Overruled.

Q Having explored the question of churning in 1968 with your attorney, Mr. Ryan, having all the facts and knowledge at your disposal in November or so, 1969, you still wanted to do business with Charles Jordon?

MR. SHAW: There is no proof he had all the knowledge at his disposal.

THE COURT: That destroys the question. Sustained.

Q We will start again.

THE COURT: Leave out that one statement, please.

Q You still sought out Mr. Jordon to do business with him; is that correct?

A With the exception, I already said several times, I belive the clipping about churning was late 1968, but I was not sure such as that the reference in here to churning twice, I don't know the date of that, whether it was before this purchase in 1969, I don't know, Mr. Mandel. But I did seek out Mr. Jordon, yes.

Q You testified this morning that when you started with Mr. Jordon, you weren't very experienced in the market; is that correct?

A That is correct.

Q I take it you mean when you started with Mr. Jordon in 1959 --

A Yes.

Q -- although you had already had a small account before then?

A Yes.

Q By the time you started with Mr. Jordon at Gross & Company in 1962, you had already accumulated some experience?

A With Mr.Jordon and the other account, yes.

Q You had an account with Merrill Lynch at that time?

A Yes, but the other account had been discontinued, yes.

Q But you also had an account with Merrill Lynch?

A Yes.

Q Whatever the state of your experience beginning in 1962, you knew you could say no to any suggestion, didn't you?

A Yes.

MR. GRUTMAN: We had this, Judge.

MR. MANDEL: Not as to this moment.

MR. GRUTMAN: We had that all along.

THE COURT: I thought we covered it.

MR. MANDEL: We covered it in general. I am pinning it down to the specific moment.

THE COURT: I think you best go on to something else.

Is it your position, Mr. Grutman, this has been covered?

MR. GRUTMAN: Yes, your Honor.

MR. MANDEL: As to the beginning of 1962?

MR. GRUTMAN: As to all the period of time, whenever he went into the market.

THE COURT: Go ahead.

MR. MANDEL: No further question.

REDIRECT EXAMINATION

BY MR. SHAW:

(In open court)

BY MR. SHAW:

Q Mr. Buckley, you were asked certain questions with respect to your testimony prior to trial, and I would like to read to you the following excerpts which were not read to you and ask you if you gave the following answers to the following questions where Mr. Mandel took your deposition on June 11, 1971/ page 62, line 16:

"Q What was done wrong in your opinion?

"MR. GELB: I object to it.

"Q You may answer.

"A I had become worried at the financial status of Westec because of some of the wild fluctuations that would go on, and to my eye, they didn't seem very rational. When discussions were held as to this with Mr. Jordon and he would frequently quote as a source information he had received, I believe from the publicity director or PR gal from Westec in Houston, his information on this satisfied my concern.

"A six-month statement -- it couldn't have been a six-month statement -- it had to be the annual report, was issued not until around May.

"Q Of what year?

"A 1966. So this was a 1965 annual report.

It seems it had dragged out so long I became concerned again."

Did you give those answers to those questions?

A Yes, I did.

Q Does this refresh your recollection, Mr. Buckley, that during this period leading up to the time that there was a suspension of trading and even prior to the time that you had spoken to Mr. Jordon from Wichita for a substantial period of time, you were concerned about the Westec stock?

A Yes. The word "substantial" is relative, like a lot of things. I think I testified earlier that once it became volatile, I was concerned about its action, yes.

Q And didn't you have more than one conversation with Mr. Jordon in which you expressed the fact that you were concerned about the stock?

A Yes, I did.

Q And didn't you have more than one conversation with Mr. Jordon when he told you there was nothing to worry about?

MR.MANDEL: I object to that as leading and prejudicial.

THE COURT: Objection sustained.

Unanswered questions are not evidence, ladies and gentlemen.

BY MR. SHAW:

Q Didn't you have more than one conversation with Mr. Jordon when he mentioned this PR gal from Westec?

A Oh, yes.

Q How many times did he mention her? That is, as having some inside information?

A I met her at the --

Q Please answer my question.

A How many times? If you need a number, I will give you half a dozen.

Q Half a dozen.

When he told you in the conversation from Wichita that there had just been or there was about to be an announcement of a copper strike and said that he had just spoken with this PR girl, that wasn't the first time that he had quoted such information to you, was it?

MR. MANDEL: I object to that question as leading. I object to its form and it misstates the evidence.

MR. SHAW: Mr. Mandel has gone into this area, and I am permitted a certain amount of latitude.

THE COURT: I will sustain the objection to form.

The subject matter, however, is different.

Q By the way, when Mr. Mandel told you during this conversation from Wichita about the copper strike --

A Mr. Jordon.

Q Yes, Mr. Jordon -- did you believe him?

A Yes.

MR.MANDEL: I object to that. There is no testimony -- first, Mr. Shaw is leading, and second there is no testimony that on anybody's part that Mr. Jordon said there was a copper strike. He said he had heard something from somebody, and that is a vastly different thing.

THE COURT: I sustain the objection.

Q When Mr. Jordon told you that he had heard that there was a copper strike,did you believe what Mr. Jordon told you?

A Yes.

Q And when Mr. Jordon told you that people were circulating rumors about the stock in an effort to depress the price of the stock so that they could buy the stock cheaply, did you believe Mr. Jordon?

MR. MANDEL: I object to that for the reason it's leading and it misstates the evidence.

I think this statement that somebody thought this was happening --

MR. GRUTMAN: It says at page 64, in his opinion somebody was trying to drive the price down before the information came out such as that they could get it at a lower price and definitely not to sell --

MR. MANDEL: I have no objection to the question phrased that way.

Q When Mr. Jordon, gave you the opinion or professed to have the opinion that people were trying to circulate rumors so that they could buy the stock cheaply, did you believe Mr. Jordon when he told you that was his opinion?

A Yes.

Q And prior to the conversation that you had with Mr. Jordon from Wichita, you had had various conversations with him about the fears that you had about the stock?

A Yes.

Q And prior to the time that Mr. Irish had gone over the financial statement --

A Mr. Clancy.

Q -- and you had called Mr. Jordon from Wichita, can you recall what fears that you expressed to Mr. Jordon were, what these fears were?

A Prior to the time of Mr. Clancy?

Q Yes.

A They were mostly then based on the uncertainty revolving around the lateness of the annual report. When things are late, I get bothered.

Q Was it also something to do with the fluctuations in price?

A I don't believe the stock was fluctuating down that early, no.

Q Did it have anything to do with anything further?

A No, Mr. Shaw, not to my recollection.

Q During these conversations with Mr. Jordon did he satisfy your concern?

A Yes, he did.

Q How did he do that, sir?

A In the lateness of the annual report that specifically we talked about already and the explanation that Westec was a company with several subsidiaries all individually inccorporated, as I recall, and it just took a while to bring the facts together, close the books.

Q Did he also take you to a breakfast meeting?

A Yes, he did.

Q To try to get you to meet Mr. Hall?

A Yes.

MR. MANDEL: Objection.

THE COURT: Haven't we been through all this?

MR. SHAW: I am about to lead up to something, your Honor.

Q At any point during these meetings prior to the telephone conversation that you made to him from Wichita, did he ever tell you that he owned or members of his family owned approximately 10,000 shares of Westec stock?

A No, he never told me that.

Q Prior to the conversation from Wichita, did you ever give Mr. Jordon instructions to sell the stock?

A Prior to Wichita --

Q Yes; to sell out the stock?

A No, I had not.

Q But the conversation from Wichita was different from the previous conversations, was it not?

THE COURT: Sustained.

MR. SHAW: Withdrawn.

Q Prior to the conversation from Wichita, had you made your mind up to do something with respect to the Westec stock?

MR. MANDEL: I object.

THE COURT: Mr. Sahw, we have had a lot of testimony on this subject, both through Mr. Grutman and the otehr examinations.

Is there something new you are going to add to it?

MR. SHAW: Yes, your Honor.

THE COURT: Go to that something new. We have gone through this. We have had a lot of discussion.

Go ahead.

BY MR. SHAW:

Q Mr. Mandel asked you a question on cross-examination as to whether when you made the telephone call from Wichita you were confused and uncertain and in doubt as to what to do with the Westec stock.

Isn't it in fact true that you had made your mind up as of the point that you made that telephone call to sell out your position?

MR. MANDEL: I object on the ground that it's leading and contrary to the evidence.

THE COURT: I think we heard so much about it that the jury probably has this answer so well in mind they remember exactly what has been said. There were many examinations about it.

I will overrule the objection and take it one last time.

What is your answer?

A Yes, I had made my mind up to sell.

Q And he told you about the cooper strike?

A Yes.

Q In the course of that conversation did he tell you anything to the effect that he and members of his family owned approximately 10,000 shares of Westec stock?

A No, he did not.

Q And in the course of this conversation did he say anything to you about the effect that your dumping 10,000 shares would have on his and his family's holdings of Westec?

A No, he did not.

Q When didyou first learn, if you did, regarding Mr. Jordon's own personal stake in Westec stock?

THE COURT: Sustained.

MR. SHAW: All right.

Q When you called Mr. Jordon up in 1969 to use him as a broker with respect to your purchases of 8200 shares of stock, as of that point you had been in contact with Mr. Ryan; correct?

A That is correct.

Q And you had retained the firm of Webster, Sheffield?

A That is correct.

Q Did either Mr. Ryan or anybody at Webster, Sheffield advise you that during this period, 1966 [illegible] at the time of that Wichita telephone conversation, Mr. Jordon owned 10,000 shares of Westec stock?

MR. MANDEL: I object to this.

MR. SHAW: This has been gone into with respect to the circumstances of his purchasing those 8200 shares in an attempt to whitewash Mr. Jordon.

THE COURT: Let's not get into that.

MR. MANDEL: This is a churning case, your Honor.

Mr. Shaw is now saying, "Did Mr. Ryan tell you something about Mr. Jordon" --

THE COURT: I will sustain the objection.

BY MR. SHAW:

Q When did you first learn anything regarding Mr. Jordon's own position in Westec stock?

A I don't know whether you call it learning or not. It was mentioned here in this courtroom or in the aisles outside. I don't know that that is the truth.

Q I would like to continue reading excerpts from the deposition.

I believe you were asked whether a time ever came when you felt you had been wronged.

of this. We have spent almost the entire day on this subject.

Priceed, please.

BY MR. SHAW:

Q 63, line 10:

"Q Go on, please. I am sorry I interrupted.

"A No, not at all.

"So I had asked somebody else who I was acquainted with who said to me he didn't like the situation, and I thought thatwas pretty good advice for Mr. Jordon, who counseled against the trying to get out of 11,000 shares of stock, which had gone from the low 60's to the mid-40's, could be done in anywhere resembling a a price, and counseled me against it, and the stock closed down. It couldn't have been more than four or five trading days of the close-down of the stock.

"Q So he thought Westec should not be sold and that is where you think he committed some wrong against you; is that right?

"A That is where he did what?

"Q Committed some wrong against you.

"A Where his counsel was wrong, yes."

Did you give those answers to those questions?

A Yes.

Q Page 84, line 14; I ask you whether you gave the following answers to these questions back in June of 1971 when Mr. Mandel was asking you questions:

"Q Was there any time between the meeting, the breakfast meeting at the Park Plaza Hotel when you met the president of Westec and your last conversation with Jordon before trading was suspended in Westec when you and Jordon had a discussion as to whether you ought to sell all or some of your Westec.

"THE WITNESS: Would you please read the question back again?

"A I do not remember any, but to repeat, I think I thought the breakfast meeting was six to eight weeks before suspension. Still having such a large position I must have talked to him about the stock. But do I recall what it was about or what advice was received or given -- but do I recall what it was about or what advice was received or given, I do not, other than the Wichita conversation I had with him, which was to sell.

"Q When was the Wichita conversation?

"A I believe two or three or four trading days before the stock was closed down.

"Q Am I putting it fairly when I say this: That you feel the bad advice Jordon gave you that you are complaining about in connection with Westec was given in this Wichita conversation; is that correct?

"A That is correct.

"Q That is one conversation we are talking about, right?

"A That one conversation.

"Q Yes.

"A Yes."

MR. MANDEL: I object to the way that is being read. It's not being read legibly. It's a very important pair of lines that Mr. Shaw is unintentionally garbling.

I will read it.

MR. SHAW: Please.

THE COURT: Say "Question" and "Answer."

Q "Q That is one conversation we are talking about, right?

"A That one conversation?

"Q Yes.

"A Yes.

"Q Since we have it down to that, would you please tell me as accurately as you can, and believe me, I am not assuming that you ought to be able to give it to me verbatim, but as accurately as you can, to the best of your recollection, what he said" --

THE COURT: Do we have to go through the next two pages of this Wichita conversation?

MR. SHAW: I will skip that and go to line 16, page 86, your Honor.

Q "A His name is Clancy, Dick Clancy of Nelson, Shannon. The name of the firm is Shannon something & Clancy, so I can't tell you what the first name is to look it up in the phone book.

"This man runs an investment advisory house, and it is a well-thought-of house, and I respect Mr. Clancy personally. I reminded Charlie that the stock was performing poorly, and I told him since the stock was performing poorly, maybe there was something about Mr. Clancy's comment about the balance sheets smelling about to come out, and I thought it was about time to sell the stock and what did he think. I told him of the 3,000 shares I had at Merrill Lynch. I had sold 500 of those based on that same information and Charlie said, 'I just talked to Betty, the PR girl,' and he was of the opinion that somebody was trying to drive the stock down because the information that was about to be forthcoming, this alleged copper mine in Chile, would be announced in a very short time and initial information looked good, and this was not the time to sell. I said all right.

"Q Can you give me at this point any kind of recapitulation" --

THE COURT: Can I ask that we don't have any recapitulation? I don't see any need whatsoever for this again. We have had this andhad it and had it and had it.

I am not even going to let Mr. Mandel put anything in when it comes his turn, his time at bat.

MR. SHAW: May I direct the Court's attention to what is stated in line 18 on that page? I think that is relevant, your Honor.

THE COURT: Read through line 22, and that is the end of it.

Q "A That they would have an announcement forthcoming in the fairly near future about initially positive drillings from this copper mine in Chile, and that information was starting to get around, and they thought some people were selling to be able to buy at a lower price than they would be able to buy a week, two weeks prior to the announcement."

Did you give those answers to those questions?

MR. MANDEL: He stopped in the middle of a question, your Honor.

MR. SHAW: Only because the Judge told me to do so.

THE COURT: I told him to.

MR. MANDEL: I believe the last part of that question is the most important.

MR. SHAW: I have no alternative but to read the rest of it in.

THE COURT: That is correct, and then we are finished.

"Q "A Based on this information from her with whom he had been in contact most of that spring and most of that summer, I continued to follow his advice."

Mr. Buckley, were those answers given to those questions and do they represent your recollection then?

A Yes.

Q And do they represent your recollection now as to what Mr. Jordon told you?

A Yes.

Q The conversations that you had with Mr. Jordon and in Wichita, had they been repeated prior to that time in substance where he was giving you information that he was reportedly obtaining from the PR girl at Westec?

THE COURT: Sustained.

Q Was this the first time when Mr. Jordon told

THE COURT: Sustained.

Q Was Mr. Ryan rendering invoices to you on an hourly billing rate?

MR. MANDEL: I object to that.

THE COURT: Sustained.

Q What was Mr. Ryan charging you per hour?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q I would like to ask you questions with respect to the calls.

When you buy or sell a call, do you do so through a put and call broker?

A The house with hom I place my order does. I believe I don't. I call Gross & Company.

Q You call Gross & Company and Gross & Company buys a put or a call; correct?

A That is correct.

Q And when they buy a put or a call, do they buy a put or a call in some instances through what is called a put and call broker?

A I believe so.

Q And in some instances do they also buy a put or a call from an individual dealing directly rather than through a broker?

A I know now they do. I did not know it then.

Q Last week you and I went over these documents marked 9 through 21 in evidence.

Do you recall doing that with me?

A Yes.

Q In the column captioned "Price," do we see the names of various persons where there is a call transaction?

A Yes.

Q And all of these calls are situations where you dealt through Charles Jordon initially, correct?

A Yes.

Q Is it in fact true that in the case of every transaction involving a call, a name appears?

A We didn't go over every page, but let's say yes. I assume there is.

Q In some cases you have the name S. Lerner; correct?

A Yes.

Q Who is S. Lerner?

A That is a put and call house.

Q And you have the name Cohn, Ivers?

A Yes.

Q That is Cohn I. That appears on the ledger sheet, correct?

A Yes.

Q And you also have the name Thomas, H.B.?

A That name means nothing to me.

Q . Don't all of these call transactions involve in one way or another Charles Jordon because he was always the initiating broker?

A He was my customer's man, yes.

Q Do you know the reason why in some of these cases involving, for example, Syntex, and I am referring to sheet 2, Exhibit 11, Fifth Avenue Coach, C. Jordon's name appears in the column captioned "Price"?

A Your question was do I know why?

Q Yes.

A Now I am totally confused. Do I know why now? Yes, I know why now.

Q What is the reason for the name S. Lerner in the column captioned "Price"?

A I assume they are the put and call house.

Q What is the reason for the name Cohen & I?

A Because of the put and call house.

Q Do you know the reason why C. Jordon's name appears on the ledger sheet?

A Yes, we did that this morning. He is the person to whom the documents were delivered, evidently.

that question is wholly irrelevant.

Q You were asked certain questions by Mr. Mandel with respect to churning and the fact that you showed a newspaper clipping to your attorney, Mr. Ryan, about churning and you were asked questions with respect to various conversations that you had with Mr. Ryan about churing.

In any of these conversations, did Mr. Ryan use the word "evolving" or "changing"?

A "Evolving," did you say?

Q Yes.

A Yes.

MR. MANDEL: I object to that.

MR. SHAW: I think it's relevant, your Honor.

THE COURT: Overruled.

Q What did he say about the evolution or change?

MR. MANDEL: I object. Evolution or change of what?

Q Of the law of churning.

MR. MANDEL: I object to that.

THE COURT: I will overrule that objection.

A Mr. Ryan said that churning was a difficult thing to prove. This is when I first brought it up. It was a difficult thing to prove. It typically involved, not to be demaning, relatively old ladies who were helpless, and I was an active businessman and people would look askance at any description of my account being churned unless it was discretionary, which it was not.

He said, however, the low is evolving, if you want to use that word, the law is changing. It is not something that is lifted from the Ten Commandments or something that courtrooms like this develop the cases upon which it was changing or evoling and would I please review with him my accounts.

At that time I again submitted to him or gave him this list of transactions and my bags full of confirmation slips and statements, and he got back to me and said, "Dave, I think you might have a case. It appears to me your account has been churned."

Q When did he say that to you?

A Before filing --

MR. MANDEL: I object to all of this, your Honor.

MR. SHAW: This has been brought into the case.

THE COURT: I want to caution the jury that this is not proof of any fact. This is a statement a lawyer has made to a client.

Whether or not it is a fact is something the effect that you owed any money?

MR. MANDEL: I object to the leading questions.

THE COURT: You have given that?

THE WITNESS: Yes.

THE COURT: Objection sustained.

Q Was there any conversation at that point about the affairs of Westec, what was going on in the company?

A No, trading was suspended. No.

THE COURT: The answer is no.

Q Was there any conversation on this occasion regarding the operations of the company in Latin America?

A No.

MR. SHAW: No further questions.

MR. GRUTMAN: I have waived my examination.

MR. MANDEL: I have a few brief questions. I hope they are few and I hope they are brief.

RECROSS-EXAMINATION

BY MR. MANDEL:

Q You met the WEstec PR girl at one time. When was that?

A That was at the Plaza breakfast.

Q This was a public relations breakfast which somehow you and Jordon got to; is that correct?

A I think you used your words very right, it was a PR breakfast with Mr. Hall there and Mr. Jordon invited me. I got there through his invitation.

Q There were lots of people there?

A Lots being fifteen, twenty; not hundreds.

Q You met Mr. Hall?

A I said hello to him over the table. If that is a meeting, yes.

Q Who later turned out to be a swindler; is that right?

A I don't know --

Q You have been reading about it. You know he went to jail.

MR. SHAW: Is there any reason why we bring this up three or four times?

There is no question about it and the PR girl went to jail. They all went to jail.

MR. MANDEL: This goes to the heart of the matter.

THE COURT: You want to know whether this witness knew that.

Q You learned that later?

A You told me in this courtroom.

Q You didn't get that from your reading?

A You asked me if I knew it, and I said no, I didn't recall that he had gone to jail. You said yes, he did.

Q You later read about the conspiracy that had been going on in Westec; is that correct?

A Yes.

Q You knew the PR girl was part of the conspiracy?

MR. GRUTMAN: Objection.

THE COURT: Overruled.

A No, I don't know that the PR girl was involved in the conspiracy.

Q You didn't read that in the Wall Street Journal?

MR. SHAW: Objection.

THE COURT: He says he doesn't know.

Q You testified, did you not, on deposition, that after you met Mr. Hall you had a better feeling about the company in which you had such a large position; is that correct?

A That is correct.

Q And you did have a better feeling?

A Yes.

Q If the man was a swindler, he helped convince you, too?

THE COURT: Sustained.

Q Did you go down or did you do something else to satisfy yourself about this company? Did you visit their plant in Texas or anyplace else at any time?

A After the close-down and before my repurchase in 1969.

Q When you met the PR girl, did you talk to her at all?

A No. She spoke, I didn't.

Q Did she seem honest to you at that time?

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

THE COURT: Sustained.

Q During all the years you were doing business with Charlie Jordon, you knew he was buying and selling stocks for himself, didn't you?

A Did I know it? No, I didn't know what he was doing. That was his business, not mind.

Q He never told you he was buying and selling stocks?

A For his own account and what they were?

Q Yes.

A No.

Q You never had the slighest discussion of that with him at any time?

A I refuse to talk a man's personal business with

MR. MANDEL: This man also made a profit.

THE COURT: That is the basis for your question, and the answer of the witness was, "I don't know."

We don't have an answer. I told the jury a number of times that unanswered questions are not evidence.

(Recess)

(In open court - jury present)

THE COURT: Mr. Shaw.

MR. SHAW: Plaintiff calls David Marcus

DAVID MARCUS, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q How are you employed presently, Mr. Marcus?

A I am vice president of the legal and compliance department of Drexel Burnham & Co., Incorporated.

Q What is the nature of the business of Drexel Burnham & Co., Incorporated?

A Drexel Burnham is a broker dealer and investment banking firm. It's a member of the New York and other major securities exchanges.

Q For what period of time have you been the vice president of this firm?

A Approximately five and a half years.

Q How were you employed prior to becoming vice presidentof Drexel Burnham?

A I was employed for a short time by another brokerage firm. Prior to that, I was employed for a little less than three years with the New York Stock Exchange where I was an assistant director of the department of member firms in charge of the exchange's conduct division, and before that I was employed by the United States Securities & Exchange Commission for something a little less than five years.

I was an enforcement attorney in its New York Regional office, and reached the position of chief attorney in the enforcement branch prior to resigning from the comission.

Q Were you with the New York Stock Exchange roughly during the period 1966 through 1969?

A That is correct, yes.

Q Prior to 1966, you were with the Securities & Exchange Commission?

A Yes.

Q Before that did you attend school?

A I was in law school until joining the commission. I attended Yale Law School, and prior to that I did my undergraduate work in economics at Columbia College.

Q Do you have a degree from Columbia College?

A Yes, a bachelor of arts.

Q In what specialty?

A I majored in economics.

Q Do you have a law degree as well from Yale?

A Yes.

Q Are you admitted to the bar?

A Yes, I am, in the State of New York.

Q Have you lectured or spoken on the subject of securities?

A Yes, I was a speaker at a Practicing Law Institute seminar on compliance procedures in the brokerage industry, and in addition I am active in the compliance division of the Securities Industry Association, which is a trade and brokerage industry association of the major brokerage firms.

I am presently president of the compliance division. This division holds annual seminars in various places throughout the country, and I have served as chairman of that seminar on two occasions and a speaker at that seminar for four of the five years in which it has been held, again on various subjects related to compliance and securities law.

Q In connection with your employment at Drexel Burnham, are you the chief compliance officers?

A Yes, I am. I am also sernior attorney in the compliance and legal division.

Q In connection witn your employment at Drexel Burnham and in connection with your employment by the New York Stock Exchange and in connection with your employment by the Securities and Exchange Commission, have you had occasion to review the records of purchases and sales of securities?

A I have, yes, in each of those capacities, yes.

Q You do that each day on a day-to-day basis at the present time?

A At the present time those duties are performed under my direction.

At the firm at times during the past, it has been my direct responsibility.

Q Are you familiar with the term "churning"?

A Yes, I am.

Q Would you tell the Court and jury what you understand that term to mean from the point of view of your job at Drexel Burnham?

MR. MANDEL; I object.

May I state the grounds of my objection?

the concept to mean; with the judge at the end of the case to instruct the jury as to what the law is, that is.

THE COURT: I will let him define churning as he understands it.

MR. MANDEL: I think it's a serious thing, your Honor, and I shake my head, and I am agreeab le, but I am not waiving my position.

THE COURT: Ladies and gentlemen, at the close of this case you are going to have to decide whether or not there was churning in Mr. Buckley's account. You are going to have to do that on the facts in this case consistent with my charge on the law.

You are now about to hear, this gentleman who comes before us, an expert witness whose testimony is to be evaluated by you at the close of the case in accordance with the instructions I will give to you as to how to evaluate the testimony of an expert witness.

It was given to you for that purpose. That does not mean that you are not going to have to find the facts yourselves in accordance with the law as I will charge you.

Go ahead, Mr. Shaw.

BY MR. SHAW:

Q Mr. Marcus, I asked you before what the word "churning" means in the context of your day-to-day business as chief compliance officer of Drexel Burnham.

Can you answer that question?

Yes. It indicates or would indicate excessive trading in an account, generally induced or influenced by the broker handling the account for the purpose of profiting the broker by way of commissions to a greater extent than benefiting the customer with respect to his deriving benefits from the account.

Q I'm sorry?

A With profiting the broker with respect to commissions generated to a greater extent or rather than profiting the customer with respect to benefits he derives from his trading in the account.

It goes beyond that. That is a simple definition.

Q Will you continue giving your definition, sir?

A Usually what we would look for is a high degree of --

THE COURT: No, this is a definition. You defined it, I take it?

THE WITNESS: That is a simple definition or a basic definition of it yes.

THE COURT: Very well.

Q You used several words in that description. I would like to ask you what you mean by using the word "trading."

A "Trading" has several applications when looking at or trying to define "churning."

One approach, and the most common, is obtaining what is called the turnover ratio, which is basically measuinr the total dollar amount of the purchases in the account over a given period of time divided by the average equity or value in the account.

There are also other indications we look for beyond that simple mathematical formula, and that is frequent in and out trading, that is a purchase followed within a short period of time by a sale of that security, particularly when there doesn't seem to be any benefit to the client in terms of no appreciable increase in the value of the stock.

Another indication is frequent in and out trading in the same security, purchasing the stock, selling it shortly after, repurchasing it again, perhaps several times over the course of a fairly short period of time, again typically with ano appreciable market increase in the stock before the stock is soldout again.

These are several of the major factors looked at in trying to determine whether an account has been churned or not.

Q In giving that definition, you used the words "benefit the broker."

Can you tell the Court and the jury what you mean by that phrase?

A Well, that ties in again with the fact that transactions may be made, purchases and sales, within a fairly short period of time with no great market appreciation to the customer; that is, the broker is making commissions on the purchases and sales; the customer may be making little if any profits in connection with these purchases and sales.

Again, when there is a pattern of these transactions and the broker seems to generate substantial commissions over a period of time, whereas the client is not benefiting accordingly, it leads one to the conclusion that an account has been churned.

Q You haven't used this phrase, but I would like to ask you to tell the Court and jury what the phrase "discretionary account" means.

A In the normal sense, a discretionary account is an account in which a client gives to the broker the right to make purchases and sales for the account without first consulting or getting the specific approval of the client.

Q What is a non-discretionary account?

A A non-discretionary account is an account, and normally the type of account in which the broker first consults with the customer to determine that the customer is in accord or agrees with the order or, of course, the customer himself initiates the transaction.

Q In relation to the definition that you gave before of "churning," can you tell us, the Court and jury, how this relate to these types of accounts, discretionary and non-discretionary accounts?

A Normally, in trying to ascertain whether an account has been churned or not, there are certain factors we look at with respect to the relationship between the broker and the customer; where a broker in fact has discretion, it can be fairly safely assumed that if there is an excessive degree of turnover, this constitutes churning because the customer is relying completely on the broker and, in fact, hasgiven him the authority to make all purchase and sale decisions.

Moving awa from that, churning can also be ascertained in a case where even though the broker does not have written discretion, which is what is required generally to have discretion over an account, the broker nevertheless in effect controls the account by being the one who induces the purchases and sales by his recommendations as opposed to the customer initiating the transactions at his own instance.

Q Could you tell the Court and the jury how the definition which you have given with respect to churning relates, if it does, to whether or not a profit in erms of cash or paper increase in values occurs?

Can you tie those concepts together for us?

A I am not sure I undersatnd what you are asking, but if you are asking whether the fact that a customer profits or does not profit affects churning, although it is a factor, it is by no means determinative.

In other words, there can be churning in any case where the broker seems to be putting his own interest above that of the customer, even though the customer may be profiting on a given transaction or even over a series of transactions or in the account in general.

Is that what you were asking me?

Q Yes.

I would like to place before you certain documents marked 9 through, I believe, 21, and ask you to look at these documents.

A Yes.

Q You have seen these documents before?

A Yes.

Q In fact, those documents were given to you or copies of them were given to you by Mr. Grutman at Mr. Grutman's office; is that true?

A That is correct.

Q When did you first see those documents? That is, approximately.

A Oh, approximately two weeks ago, I suppose.

Q Did you make or cause to be made an analysis of those documents?

A Yes, I did.

Q Did you make certain mathematical computations?

A Yes.

Q Were those computations based upon the documents before you?

A Yes, they were. They were based on these statements.

Q Were the calculations also based upon certain public records with respect to the market value of certain securities in the New York and American Stock Exchange during the pertinent periods reflected in those documents?

A Yes.

Q Did you prepare a chart summarizing your findings?

A Yes.

Q May I have it?

A Yes.

MR. SHAW: May this be marked as Plaintiff's Exhibit for identification.

* * (Plaintiff's Exhibit 49 marked for identification.)

Q Does Plaintiff's Exhibit 49 for identification correctly set forth mathematical computations based upon the Exhibits 9 through 21 before you?

A Yes, I believe it does.

Q Does it summarize the information contained in those documents during the period second quarter 1962 through third quarter 1966?

A Yes, it does.

Q Does it total the amount of purchases in those accounts?

A Yes.

Q For those quarters?

A That is correct, yes.

Q Does it correctly make those totals based upon the information contained in those documents before you?

A Yes.

Q Does it also calculate the equity during those quarters?

A Yes.

Q How do you define "equity."

A "Equity" is the value in an account at any given moment based upon the securities positions in the account and the money balances that exists in the account.

Q Did you also --

MR. MANDEL: Can I have that again?

(Answer read)

Q And did you also calculate the turnover ratio based upon those documents?

A Yes.

Q What do you mean by "turnover ratio"?

A "Turnover ratio" is the value, the total dollar cost of the purchases in the account for the period under review or under question, divided by the equity in the account.

Q Did you make that calculation based upon these documents for each quarter during the period from the second quarter of 1962 through the third quarter of 1966?

A Yes.

MR. SHAW: I offer this document in evidence.

MR. GRUTMAN: No objection.

MR. SHAW: I have just given Mr. Mandel a lengthy and rather complicated summary. It is almost closing time.

I am wondering --

MR. MANDEL: I won't object to its admissibility.

MR. SHAW: Thank you very much, Mr. Mandel.

* (Plaintiff's Exhibit 49 for identification was received in evidence.)

THE COURT: Mr. Marcus, purchases are total number of shares?

THE WITNESS: The total dollar cost of all the purchases for the given period. In other words, each of those figures under the purchases column is the total dollar value of all purchases made during the quarter in question.

THE COURT: And the minus means --

THE WITNESS: The typist just put that in. It doesn't signify anything whatever.

THE COURT: All right.

Q In making the calculation reflected in this document, did you use the same type of mathematical approach that you use in your day-to-day business?

A Yes, this is the commonly used approach for calculating turnover ratio and certainly the one we use when we have occasion to make them.

Q Will you tell the Court and the jury what you found, based upon your examination of these records?

A Well, again, and as I indicated before in discussing churning generally, two factors or two approaches are used.

One is the calculation we have here, which is the mathematical formula approach, and there is also the review of the actual trading looking at the statements and just looking at the activity as a general matter.

In the latter approach, I did observe in looking at the statements and reviewing these documents that there were frequent transactions where purchases were made, sales of the securities were effected within a short time thereafter at little or no profit to the client.

In some instances, in fact, the same security was purchased, sold and repurchased within a fairly short period of time without any appreciable change in price either way.

We then also conducted the mathematical

turnover analysis, which was the basis of this document, and this was affected for the entire period represented by the statements.

We found that the account was active beginning with the first quarter when the turnover was not very great and just a few purchases were made, but thereafter, starting with the third quarter of 1962, the turnover rate in any given quarter was generally, fairly high, and this carried throughout the period until 1966, when activity in the account diminished substantially, and for that period there were in fact -- in fact, the last two quarters of 1966, second and third quarter, the dollar value of the purchases was none, so there was no turnover ratio.

Other than those quarters, throughout most of the period and certainly reaching the high point in 1963 and particularly in 1964, the turnover ratios were quite substantial.

During the year 1964, for example, adding up the turnover ratio calculated for each of the four quarters in that year, the turnover ratio was 15 times. In other words, the average equity in the account for the four quarters was turned over approximately 15 times.

Q What year was that?

A 1964. Overall for the entire period in question, the entire four and a half years during which the calculation was made, the annual or average turnover rate each year was something in excess of five times calculated by averaging out the total purchases divided by the average equity, and then dividing by four and a half years.

In addition, a higher figure is reached by averaging up each individual quarter's turnover ratio.

If you average up the turnover ratio that we arrived at from each quarter, it comes to almost 7 times on an average basis, 7 times per year.

Q Mr. Marcus, during the year 1964, how many times was the capital or, rather, the equity in the account turned over?

A Approximately 15 times.

Q And during the year 1966 --

THE COURT: Mr. Shaw, does Mr. Mandel have a copy of this?

MR. SHAW: No.

THE COURT: I think that is important, and I will ask you to work with the witness' copy, and Mr. Mandel will have a copy of this during the examination.

Would you like some of this testimony read back so you can read it against the exhibit?

MR. MANDEL: It's all right, your Honor. I think I have it, or I can check it. I appreciate the courtesy.

THE COURT: Let's go on.

BY MR. SHAW:

Q Mr. Marcus, what was the highest turnover atio in any quarter?

A The third quarter of 1964.

Q What was the amount of times the equity in the account was invested and reinvested during that quarter?

A 5 point --

MR. MANDEL: I object to the form of the question because I think it is a little misleading.

MR. SHAW: I will withdraw the question, your Honor.

Q When you say turnover, do you mean that the equity is invested and then reinvested and invested and reinvested a certain number of times, and that number of times is the ratio that you are referring to?

A That in effect is what it represents. It is really the mathematical formulation, as I indicated before, of adding up the total dollar value of all the purchases during that three-month period and dividing it by the equity in the account at the end of that quarter.

Q I was asking you the question how many times the account was invested or, rather, turned over during the third quarter of 1964.

A Yes, 5.12 times.

Q In one three-month period?

A That is correct.

Q How many times was the account turned over during the second quarter of 1964?

A 5.07 times.

Q Again, that is another three-month period?

A That is correct.

Q Did you average out the turnover ratio over the entire life of the account?

A Yes.

Q What conclusion did you reach as to how many times the account had been turned over on average?

A Well, there were two bases on which this was calculated. The one was to use in effect the same approach as was used with respect to each quarter, and that was adding up the total dollar value for the entire four-and-a-half-year period, and dividing it by the average of the equity figures here and based on that method, the annual turnover rate, the average turnover rate per year for the four-and-a-half-year period came to 5.02 times.

Taking another approach, we also averaged out each quarter's turnover ratio and divided that by the number of quarters involved, and using that method we arrived at a turnover rate of 6.96.

Q Based upon your experience with Drexel Burnham, what is the limit of the amounts or, rather, the ratio in which capital may be turned over?

THE COURT: Sustained.

MR.MANDEL; I object to that question.

THE COURT: Sustained.

Q Do you have an opinion with a reasonable amount of certainty based upon your familiarity with the brokerage business, your experience with Drexel Burnham, your period of employment with the New York Stock Exchange and your period of employment with the Securities and Exchange Commission as to what the maximum ratio or turnover ratio is?

MR. MANDEL: I object. Unless it is established by a foundation that the man is talking about a particular kind of account, who make the decisions and who has fixed the maximum, and what the relationship is.

THE COURT: I sustain the objection. -

Q Do you have any opinion with respect to the

MR. SHAW: I withdraw the question, your Honor.

THE COURT: All right.

Q Mr. Marcus, would you tell us, based upon your understanding, what the meaning of the word "suitability" is in your field?

MR. MANDEL: I am going to object on the ground that this has nothing to do with the churning case.

THE COURT: How about that?

MR. SHAW: I will rephrase the question.

Q Will you describe the use of the word "suitability" in relation to your definition of "churning"?

MR. SHAW: They are related, your Honor, and I want that meaning as it involves churning.

MR. MANDEL: It's leading, your Honor.

THE COURT: At this point I will overrule that objection, not because it isn't well-taken but because it does not make any different at this point.

Go ahead.

A In determining whether a situation gives rise to a churning, in effect, you look at whether or not the activity in the account is proper with respect to the financial needs, circumstances, investment objectives, background of the customer and different rates of turnover may be proper for different types of people, different types of customers, and, therefore, you have to make a determination in each instance as to whether the trading in the account was proper or, in other words, suitable for that particular customer.

Q Mr. Marcus, during this trial we have also heard the phrase, "Know your customer."

Will you tell us what that phrase means in the securities field?

MR. MANDEL: I object, unless it's somehow connected, unless this witness says it has something to do with churning.

MR. SHAW: We have a clearing agreement which uses that phrase and we have a cause of action based on that agreement, and I suggest this is related to the concept of churning.

I will rephrase the question to make it relate to that concept if necessary, but it's meaningless to do that.

THE COURT: I will take the answer. It may or may not apply to these facts.

MR. MANDEL: It may be prejudicial.

Will you take it subject to connection, so that unless the witness --

THE COURT: Yes, it may or may not apply to the facts.

A "Know your customer" is a term derived essentially from a rule of the New York Stock Exchange, which says in effect that all firms and customer's men must know the basic facts with respect to each of their customers and each order which they effect for their customers.

The basic facts with respect to each customer and each order effected by the firm and account executive for each customer, that is. Basic facts would mean, again, the financial circumstances and needs of the customer and also then, of course, how each transaction fits into those needs and circumstances of the customer.

Q How is that, if it is, related to the concept of churning?

A Again,as I indicated with respect to suitability and the concepts are fairly closely aligned, in defining "churning," you look not only at the turnover rate,but how that relates to the basic financial circumstances, experience and needs of the particular customer.

Q Was this rule, "Know your customer," in effect during the year or years 1962 through 1966?

A Yes, it was.

Q Are those rules presently in effect?

A Yes, they are.

Q Are you familiar with the rule as it presently is in effect?

A Yes.

THE COURT: Sustained.

Q Mr. Marcus, I would like you to show the Court and the jury, based on Exhibits 9 through 21 before you, specific examples of what you referred to yesterday as turnover of investments.

A Besides the general turnover ate which I indicated in respect to specific transactions or specific examples, there are, for example, in 19 -- the account statements for 1964 for Mr. Buckley's account, there are, for example, many trades or there are transactions in his cash account in September of 1964 where during a period September 10th through 16th there were purchases of several thousand -- let's see -- 10,000 shares of a stock called Consolidated Marbenor at prices in Canadian funds ranging from $1.85 through $2.29. These were sold for -- 5800 are sold out during the month of October, which is approximately one month later, at prices ranging from $2.05 and mostly at $2.10 or $2.15 Canadian funds, which in effect really yielded little if anything to the customer during that short time, certainly the price had not changed significantly, and some of these were sold at a price below the 2.29 price that 4,000 of the shares had been bought at.

Later on -- not later on -- in the margin account there are transactions in the month of July where --

MR. MANDEL: 1964 still?

THE WITNESS: Yes, this is all in 1964.

July 6th --

THE COURT: Are you going now to something else?

THE WITNESS: Yes, other similar transactions. The month of July in the margin account, there are purchases of Lukens Steel, 300 bought at 80 and 80-3/4, another 100 at 80. The first was on July 6th, 300. This appears to be July 8th, another 100 at 80; and on July 24th, 100 Lukens Steel is sold at 77-3/4; another 100 sold at 78 on July 28th; and another 100 at the same date at 78-1/8; and another 100 sold on July 29th at 77.

Similarly on July 8th it appears to be again there is 1,000 Raytheon Corporation purchased at 21-1/2, and those shares are sold commencing on August 10th, it appears, 300 at 21; another 100 at 21-3/8; another 100 at

21-1/2, that was August 13th and 14th; again, given the prices there, there are no profits at all to the customer even though they are sold out at a short time.

These are a couple of examples.

MR. MANDEL: I object to this. He said the customer was sold out.

MR. SHAW: Were sold out. He didn't say "was sold out."

MR. MANDEL: You say the stocks were sold out?

THE WITNESS: The stocks were sold, yes. I was not suggesting these were sell-outs pursuant to margin calls.

These are a few examples. There are numerous instances of this kind where stocks were sold within a matter of a few weeks or a month with little or no profit to the customer.

BY MR. SHAW:

Q How does a customer benefit by such purchases and sales?

MR. MANDEL: I object.

THE COURT: Sustained.

Q What is the economic result of such purchases and sales?

THE COURT: We don't need an expert for that, Mr. Shaw. He has already given us testimony.

Q How are commissions earned by a customer's man?

A By effecting purchases and sales for his customers.

MR. MANDEL: I'm sorry, can I have the last question and answer?

THE COURT: How are commissions earned, he asked.

Q Is there any possible benefit which can be derived by a customer from a repeated pattern of purchasing and selling shares?

A None that I know of.

THE COURT: I am going to sustain the objection to that and strike the answer.

MR. SHAW: As far as I am concerned, that is a perfectly proper question, and I would like to address you at the bench if I may on that.

THE COURT: Come over to the side bar.

At this point the objection is sustained and the answer is stricken.

(At the side bar)

THE COURT: Where is the foundation in the record for that?

MR. SHAW: We have testimony to the effect will sustain the objection.

MR. SHAW: I will try to establish that.

THE COURT: You can't with this gentleman, because there is no proof as to what the investor's intent was.

(In open court)

BY MR. SHAW:

Q You made various illustrations with respect to the year 1964 earlier today. I would like to direct your attention to the year 1955 and the year 1966, and a specific stock called Western Equities or Westec, and ask you if you can illustrate the turning over of the account with respect to the securities of this corporation, Westec.

MR. MANDEL: I object to the form of the question.

THE COURT: I am not quite clear as to what he is being asked to do.

MR. SHAW: I will withdraw the question.

Q Will you tell us what the ledgers reflect with respect to the purchases and sales of Westec during the years 1965 and 1966?

A Purchases begin in October. There are purchases in the account of David Buckley beginning on October 4th, it appears to be.

Q 1965?

A 1965. There are purchases of 1,000 shares at 13-5/8; another 700 sahres at 14-3/8 on October 5th; another 2,000 shares at 14-3/4 on October 6th.

In the account of Mary Buckley, starting in February of 1965, there are purchases on February 11th of 2,000 shares at prices ranging from 8-1/2 through $9; another 900 shares purchased in that same account on February 15th at 8-7/8; another 1700 on February 18th at 9-1/8 and 9-1/4; another 900 on February 17th at 9-1/4; 500 more on March 5th at 9-5/8; 500 more on March 8th, 9-3/4; 1500 more on March 10th at 10 and 10-1/8; on March 11th, another 1300 at 10 and 10-1/8; and on July 14th, 3000 are sold at 9-3/4, and 1200 at 10 also sold; July 16th, 1500 are sold at 10-1/8; 200 at 10-1/4, and 1700 at 10-1/2. On July 19th, 1300 are sold at 10-1/2.

On July 23, 600 are sold at 10-7/8.

On August 18th, I believe it is --

Q 1965?

A Yes --'65 still. 10,000 are purchased at 11; another 1,000 at 11-1/2; and 800 more at 11-1/3.

THE COURT: What is the date of that?

THE WITNESS: August 18th of 1965.

On August 19th, 4600 are purchased at what looks like 11-5/8. It could be 3/8, but it looks like 5/8.

On September 16th, 100 are purchased at 11-3/8.

Those shares in the Mary Buckly account remain there through 1966.

Q What was the number of Westec shares in the Mary Buckley account?

A 7600.

MR. MANDEL: Is that the net left after the buys and sells?

THE WITNESS: Correct.

Similarly, in the David Buckley account, the 3700 shares which had been purchased in 1965 remain there throughout 1966.

Q I ask you also to tell the Court and jury what the phrase "paper profit" means in relation to the concept of churning in your industry.

A A paper profit is a profit based on a change in the price of a stock which is not realized because assuming you have purchased the stock, it hasn't been sold.

In connection with churning, it is not really determinative of anything specific because until the securities are sold, you haven't realized a profit, but churning can be established regardless of the existence of paper profits, because with respect to the accounts in question, assuming there is a high degree of activity, you look at the result of the transactions that are in question and the churning that is, the rapid purchases and sales, and compare the profits there, if any, accrued to the customer as compared to the commissions on those transactions accured to the customer.

MR. MANDEL: I object and ask that that answer be stricken from the record unless it's qualified not as to what the law is but what this witness' practice is.

MR. SHAW: That was my question, in his industry.

I phrased all my questions --

MR. MANDEL: What is churning, what are paper profits.

MR. SHAW: I object. That is a form of cross-examination by Mr. Mandel.

THE COURT: As you understand it, this is a factual amount?

THE WITNESS: That is correct.

THE COURT: Overruled.

Q Can there be a paper profit in an account which is churned?

A Sure.

Q Is a paper profit created through churning?

A No, by definition a paper profit --

THE COURT: That is enough.

Q You just answered that question, "No." Will you give us the basis for your opinion?

A Yes. Churning is rapid purchases and sales, whereas paper profits are not accrued from purchases alone. The necessity is -- I'm sorry -- paper profits are not accrued until -- I take that back.

A paper profit is one which is accured in a stock which you have purchased and not yet sold.

Q And held?

A That is correct.

Q Will you tell the Court and the jury what the meaning to you in your industry is of the word "calls"?

A A call is an option or a contract which give the purchaser of the call the right to buy the stock from the seller of the call at a specific price within a given period of time.

Q Are there brokers who specialize in the sale of calls?

A Well, if you mean customer's men, within a general brokerage firm sometimes there are salesmen who specialize in or predominantly deal in puts and calls.

If you mean specific types of firms, there are put and call brokers who deal in options, yes.

Q Can you tell the Court and the jury how the concept of calls fits in, if it does, based upon your experience and in your industry with the concept of churning?

A Well --

THE COURT: If it does.

MR. SHAW: That is what I said, if it does.

A There are two ways to look at it. From one standpoint to the extent that calls have a limited life, they almost necessitate somewhat of a recurring activity because if a call has six months' duration,at the end of six months it will either expire or you must exercise it if it is advantageous to do so. So it leads toward the generation of a possible purchase.

On the other hand, in terms of how it really affects turnover rate, I don't think it does. All calls really do in the final analysis give you the opportunity to use your given sum of money to potentially benefit from a price increase in more securities than you could if you were buying the stock itself.

But in the final analysis, when you buy calls or the stock itself, you may be investing the same dollar. It's just that you might buy ten calls on a stock for the same price that you might be able to buy only 100 shares in that stock. But the dollars invested would be the same in either case. You are just getting the ability to gain from appreciationten times the number of shares by buying the calls.

But in terms of your turnover ate, you are investing the same number of dollars either way.

Q Is there a separate market for calls?

A Well, of course today there is the exchange markets in calls, but they did not exist at that time. Otherwise the market for calls was bssically through put and call brokers in '62 through '66.

Q Is it possible to buy a call on a stock for less money than would be required to be paid if one were to actually purchase that stock?

A Well, assuming as a general matter you are buying a call with a striking price at about the current market price, it almost certainly would be substantially less money than buying the same number of shares at the current time.

Q How is the commission calculated,payble to the customer's man or the brokerage house with whom he works where the customer purchases a call?

A Again, it's different today, but with respect to over-the-counter calls, which is what we are talking about, and certainly what was dealt in at that time, the customer's man did not really get a direct commission the way he would from the purchase of stock.

The way that would work is it was customary for the put and call broker to pay a fairly nominal sum to the purchasing broker with respect to the transaction. The way the buying broker usually got his income with respect to call transactions was, of course, if later on the call was exercised, he got the stock commissions on that. In addition, there were often -- it was usually if a firm or a broker did a fair amount of business with a certain put and call broker that the put and call broker would give back some of this stock business to that broker or that firm to repay them for the business directed to the put and call broker.

Q How does the customer profit through the purchase of the call, if he does?

A If the stock appreciates above the exercise price, that is, the price at which he can buy the stock by exercising the call, then he exercises the call, and then either holds the stock for further appreciation or sells it out, assuming he can do so profitably upon exercising the call.

Q Does the customer, when he purchases the call, have the right to buy the stcok from a named person or persons or brokerage company?

A The call is endorsed by a member firm, generally a member firm of the New York Stock Exhcnage, and it gives the owner of the call the right, to, purchase from that endorsing or guaranteeing broker that number of shares at the stated price.

Q Have you looked at the ledger cards? You have looked at the ledger cards in this case, correct?

A Yes, sir.

Q And you are familiar with ledger cards in general having produced them in the course of your day-to-day activities for almost the past 20 years; is that correct?

A It's about 15 now.

Q I'm sorry.

Assuming that in the column captioned --

MR. MANDEL: Do I understand that this gentleman is now being offered as an expert on the meaning of Newburger, Loeb & Company's books and not as an expert on churning, and that he is about to testify --

There is an innuendo which Mr. Mandel has created but there is no proof whatsoever that I can see that what I believe to be the fact and what is prima facie by the record is not in fact true.

THE COURT: I am not going to permit this to be proven by an expert witness given Mr. Buckley's testimony yesterday as to what he understood the fact to be.

You may cross-examine Mr. Jordon on this subject as and if and when you get to him.

MR. SHAW: I can't ask the witness how he would interpret this?

THE COURT: No. These are Newburger,Loeb's records. If Newburger, Loeb can testify that this means so and so, that is one thing, or if Mr. Jordon wants to say that that is one thing or Mr. Buckley.

MR. SHAW: Thank you very much, your Honor.

(In open court)

BY MR. SHAW:

Q Mr. Marcus, yesterday we received in evidence this schedule that you prepared, Plaintiff's Exhibit 49, and do you recognize blown up on the blackboard an enlargement of the schedule that you prepared, based upon your analysis of the ledger cards before you?

A Yes.

Q Did you base your analysis in any respect upon the number of transactions in the Buckley ledger cards?

A No.

Q I show you Plaintiff's Exhibit 4 and ask you if you recognize that as an account card.

A Of course, almost each firm's account card varies in form, but it seems to be a type of account card in terms of the information and the items that appear on this sheet.

Q What is an account card?

A An account card is the card that is generally prepared by brokerage firms to obtain the basic information required by the "Know your customer rule," and also generally used and apparently in this case to denote the approval required by the proper supervisory persons at the firm for the account to be carried by the firm.

Q Mr. Marcus, I would like you to assume the truth of everything set forth in that account card, and I would also like you to assume the truth of everything set forth in the ledger cards, Exhibits 19 through 21, which you have analyzed; and I ask you, sir, whether you have, based upon your experience in the securities industry, an opinion with a reasonable degree of certainty with respect to the degree of frequency in which the equity in the Buckley accounts was turned over.

time.

Assume further that he had five children. Assume further that his father was loaning money to him --

THE COURT: I ruled on this last night and made my suggestion on that score, and I am sorry you didn't feel you wanted to adopt it.

MR. GRUTMAN: Can we suspend?

(In open court) , ,

THE COURT: We will take a midmorning recess, ladies and gentlemen. You are excused.

(Jury left the courtroom)

(In open court - jury present)

MR. SHAW: May I proceed, your HOnor?

THE COURT: Please do.

BY MR. SHAW:

Q Mr. Marcus, I am going to ask you to assume the following:

Assume the truthfulness and correctness of the information set forth in the ledger cards, Exhibits 9 through 21 before you;

Also assume the truthfulness and correctness of the account card, Exhibit 4 before you, and assume that they relate to the same person.

I also ask you to assume that David and Mary

Buckley during the year 1962 were husband and wife, and at the beginning of the period had two children and at the end of the period had five children.

I ask you further to assume that during this period Marcy Buckley was, as set forth in the account card, a housewife; and that David Buckley was employed as an executive at Lever Brothers, earning during the beginning of the period approximately $15,000 per year and at the end of the period in 1966 approximately $30,000 per year.

I would like you further to assume that—David Buckley's parents were in the practice of each year of giving to David Buckley stock of the market value of approximately $5,000 for both David, Mary and each one of their children.

I would like you further to assume that David Buckley had a college education, where I believe he had a B.A. in economics and had a graduate degree in business and upon leaving his graduate school went to work for Lever Brothers.

I would like you further to assume that at the end of the period 1966 the assets of David Buckley and Mary Buckley as of the date December 15, 1966, were as set forth on this chart.

MR. GRUTMAN: Can Mr. Mandel sit down, please? Thank you.

THE COURT: Mr. Grutman, I just don't like that kind of comment, sir. I have seen you and Mr. Shaw stand, rise, do all kinds of things. I feel that was inappropriate.

I am sorry I must mention it.

MR. GRUTMAN: I think it was inappropriate for Mr. Mandel to interrupt Mr. Shaw's questions.

THE COURT: Mr, Mandel went over to help Mr. Shaw turn over the thing and came back.

If you have any comment, rather than tossing it over your shoulder at Mr. Mandel, you can address it to me.

MR. GRUTMAN: I shall, your Honor. I take a contrary view to what Mr. Mandel is about now, before and through the trial.

MR. SHAW: I am going to refrain from making any comment, your Honor.

THE COURT: Plase do. I wish no comment.

Will you continue with your question or read it as far as it's gone.

Pick up the thread and read the seven or eight last words, and go forward.

(Question read)

Q I would also like you to assume that Mr. Buckley was of the age of 31 in 1962.

I would also like you to assume that during this period 1962 thorugh 1966, between 80 percent and 90 percent of the transactions in the account were as a result of the recommendation and were initiated by the customer's man.

I would like you further to assume that during this period, at the beginning, the customer's man was in telephonic contact with the customer approximately ten times per week, but during the middle period telephonic contact was as many as five to nine times per day.

Based upon the foregoing assumptions, I ask you -- well, I further ask you to assume one further factor, that during this period 1962 through 1966, the customer had three operations for suspected cancer and one operation in which a pin was implanted in his sternum, which is a bone in his hip, causing drainage.

Based upon these assumptions, I ask you if you have at the present time an opinion with a reasonable degree of certainty, based upon your experience in this field regarding the degree of turnover in this account.

MR. MANDEL: I object to the form of the question for a number of reasons, your Honor.

THE COURT: Let's meet at the side bar.

THE COURT: Che objection is overruled. Read the question.

(Question read)

A Yes. Taking all the facts that we have given in your hypothetical, I would say that the account was excessively traded or churned.

Q Is that your opinion with respect to the various quarters of the year referred to in the schedule you created?

A Well, with respect to most of the quarters taken individually, I would say yes.

Q Is it your opinion with respect to the second quarter of 1962 that there was churning?

A That was really the inception of the account, and it would be hard to base an opinion on that one quarter alone with the amount of trading in that quarters.

Q I ask you the same question with respect to the third quarter of 1962.

A Yes.

Q I ask you that question with respect to the fourth quarter of 1962.

A Yes.

Q I ask you that question with respect to the first quarter of 1963.

A Yes.

Q I ask you that question with respect to the second quarter of 1963.

A Yes.

Q I ask you that question with respect to the third quarter of 1963.

A Yes.

Q I ask you that question with respect to the fourth quarter of 1963.

A Yes.

Q I ask you that question with respect to the first quarter of 1964.

A Yes.

Q I ask you that question with respect to the second quarter of 1964.

A Yes.

Q I ask you that question with respect to the third quarter of 1964.

A Yes.

Q I ask you that question with respect to the fourth quarter of 1964.

A Yes.

Q I ask you that question with respect to the first quarter of 1965.

Q That is strictly on a turnover ratio. It's close. It probably would be considered excessive, but it's not probably too much over acceptable limits, as I view it.

Q I ask you that question with respect to the second quarter of 1965.

A That again, taking that quarter separately and apart, is probably within what I would consider acceptable limits.

Q I ask you that question with respect to the third quarter of 1965.

A That is excessive.

Q I ask you that question with respect to the fourth quarter of 1965.

A Again, that is at a lower rate and perhaps for this account might not be considered outside the acceptable limits.

Q I ask you that question with respect to the first quarter of 1966.

A At that point, the account was in effect apparently winding down, so there was very little activity, and that would not be excessive.

Q I ask you the same question with respect to the second quarter of 1966.

A There, there was no turnover in terms o f our definition or the way in which we calculate it.

Q I ask you that question with respect to the third quarter of 1966.

A Again, there is no turnover there, so it could not be considered excessive.

Q With respect to the opinion that you have testified to that there is what you have found, would you tell the Court and the jury the basis for your opinion?

A Yes. Given the facts as outlined in the hypothetical, given Mr. Buckley's financial circumstances, the fact that most of the transactions were generated or induced by the customer's man, I conclude that the turnover for almost all the quarters and certainly taking the whole period together as a whole was clearly far breater than warranted for this customer.

I would say basically it would lead one to the conclusion that the trading was being induced more for the benefit of the broker than for the customer.

Q Based upon the facts which I have asked you toassume, I ask you whether you have any opinion with respect to the suitability of the investments made in this account.

MR. MANDEL: I object to tha

Q As it relates to the concept of churning.

A I think one necessarily --

MR. SHAW: There is an objection.

THE COURT: The problem is, Mr. Marcus really said, according to my notes, he did not define in what way it is a factor.

At this point I don't see there is a foundation for that.

I will sustain the objection.

Q How is suitability related, if it is, to the concept of churning?

A Suitability is really the process by which you try to relate the rate of turnover to the client's financial circumstances and overall situation, and I think one necessarily concludes that trading or ate of turnover is unsuitable for a given client if one concludes that the account was churned.

Q Does that take into --

MR. MANDEL: I move to strike that answer on the ground that it seems to be meaningless.

As I understand it, the witness says if churning occurred, it was unsuitable. He said no more than that.

THE COURT: I strike that answer, yes.

Q Would you describe for the Court and jury how the concept of suitability has bearing upon the concept of churning, if it does?

A Well, suitability in general is usually related to the propriety of securities recommended to or purchased by an account with respect to his overall situation, financial, family, background and what have you.

In answering a moment ago I understood myself to be limited in answering the question with respect to suitability to the way in which it relates specifically to defining or identifying churning.

In that regard, I do think there is a very close relation between the concept of suitability and churning in that in determining whether an account was churned, you are trying to determine whether the trading in that account, the degree of it andthe nature of it, is proper for thatcustomer.

To me that is certainly a suitability concept.

In other words, there are customers for whom a certain rate of turnover may be suitable, and therefore that would not be churning.

I am using it again only as it relates to churning which is what I understood myself to be asked.

Q Let me ask you this next question then:

Again based upon the facts that I have asked you to assume, do you have an opinion based upon your experience in this field with a reasonable degree of certainty regarding the suitability of the purchases and sales in this account?

MR. MANDEL: I object, your Honor.

THE COURT: Which definition are we using at this point?

MR. SHAW: The previous definition the witness has given.

THE COURT: The witness has given us two definitions. One has to do with whether the quality of the stock is appropriate to this account, and the other has to do with whether because there is excessive trading, it is therefore unsuitable.

Am I right, Mr. Marcus?

THE WITNESS: Exactly.

THE COURT: That is what you said here, and that is why when Mr. Mandel objected, it seems to me we have two definitions floating around.

Q Will you restate the second definition?

A Relating it to churning, or just the general concept?

Q Relating it to churning.

A It is the correlation between the rate of turnover tying it in with the customer's financial circumstances, needs, and the other underlying or background facts with respect to his situation.

Q Taking into consideration the facts that I have set forth in the hypothetical question, do you have an opinion regarding the suitability of these investments?

MR. MANDEL: Excuse me, your Honor. I object on the grounds that it's been asked and answered.

THE COURT: On that definition, it has. Sustained.

Q I ask you to assume that during this period 1962 through 1966, in addition to the facts that I have given you, that the customer subscribed to various financial newsletters and periodicals, and I ask you whether your opinion is changed.

A No.

Q I ask you further to assume that during this period the customer had another account at another brokerage firm wherein he made purchases and sales of seurities, in many instances the same securities being purchased in this particular account, and ask you whether your opinion has been changed.

A No, that would not change my opinion.

Q I ask you to assume that during this period the customer's man initiated the transaction in only 65 percent of the instances.

Does that change --

MR. MANDEL: I object to the form of "initiated the transaction."

I think the testimony, what we have been talking about, is tomake the suggestion.

MR. SHAW: I will rephrase the question.

Q I ask you to assume that during this period on only 65 percent of the instances, the customer's man suggested the purchase of the stock involved.

Does that change your opinion?

A No.

Q I ask you to assume that in all of these instances, the customer knew of and approved the purchase. Does that change your opinion?

A No.

Q I ask you further to assume, and I believe the documents show this, that this was a non-discretionary account.

Does that change your opinion?

A No, certainly not.

MR. SHAW: No further questions.

says there, I really have no independent knowledge of it.

MR. MANDEL: All right.

Q You said, as I recall it, that based on certain facts the ratio of turnover was improper.

What is your standard for establishing the ratio of turnover in any given case?

A The problem is that it would vary in a given case depending upon the customer's financial circumstances, his experience, his worth, his dollar value; these among other things. And the others I testified about earlier would enter into at arriving into a particular acceptable turnover rate.

Q How many variables are there --

MR. SHAW: I didn't hear the ending of the answer.

THE WITNESS: These factors would enter into arriving at what is an acceptable turnover rate for a given situation.

Q I would like you to enumerate every single factor which you know of which can enter into the determination of an acceptable turnover ratio for an account.

A Well, beyond the basic mathematical calculation, of course, which is based on the total dollar value of the purchases and the equity, the circumstances of the customer and the relationship, you would look at --

Q Can we start with 1, 2, 3; separate them and identify them?

MR. SHAW: Objection.

THE COURT: Overruled.

Try to separate the category.

Overruled.

A The customer's net worth, earnings, age, family situation, investment experience, education, his aim or objectives, the degree to which transactions are initiated [illegible] recommended by the account executive, the nature of the frequency of trading, purchasing and selling a given security with little or no change in the price of the security.

Q Excuse me. Are you testifying that this last factor has to do with a proper capital turnover ratio?

A No, but it is an observation in arriving at a determination of churning.

Q My question is restricted to this: Factors used in the determination of a proper capital turnover ratio, and I think you will agree with me that looking at the quickness of ins and outs has nothing to do with that; right?

A With the sole determination of turnover, yes.

Q Let's get back on the track --

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Just ask the question.

BY MR. MANDEL:

Q Please continue with the separate factors which enter into the determination of a proper, in your opinion, turnover ratio.

A The customer's age.,

Q You said that.

A The customer's health, perhaps, whether or not discretion over the account exists, written discretion, in fact, discretion in favor of the account executive; the degree to which the client relies upon the recommendations of the account executive; the degree to which the customer understands the nature of the activity or the trading in the account; the k nowledge of the customer with respect to the transactions; and more particularly, the amount of commissions generated as compared to how the customer himself is faring in the account.

Those are the ones that come to mind at this moment.

Q Nothing else?

A I think that certainly covers the essential or major facts.

Q As I have counted it, you have given 13 factors or 14, and I now ask you how you weigh one factor against the other in reaching a decision -- I should say opinion.

Is my question clear to you, Mr. Marcus?

A Yes, I think it is.

The key elements are really the basic turnover rate itself, the basic mathematical.

Q We are talking about the propriety of the turnover rate, so the question of how you determine whether a given rate is proper or not is not a key element of the criteria which you use.

Do you follow my question?

A I think I do, but I don't know if I agree with what you are saying.

MR. SHAW: Can we have a question put to the witness?

THE COURT: I overruled your objection, and I thought the question was still pending.

MR. GRUTMAN: He doesn't agree with what he is saying. He understood the question, but he doesn't agree with the postulates embodied in the question.

MR. SHAW: He just said, "I don't agree with it."

Q Let me try again. We are talking now about the question of how you determine whether a turnover rate of one or a turnover rate of, say, 18, would be proper in a given case.

I suggest to you that looking at the actual turnover rate does not help in answering the question of what rate is proper.

Do you agree with that?

A Yes, if that is your question.

Q So we understand each other now.

We are now going back to the prior question which is of the 13 or 14 elements, how do you weigh those elements in reaching a proper turnover rate, in your opinion?

A The problem with answering that question is that most of the elements dealing with the customer's overall situation are somewhat interrelated, but obviously the more important onces of those factors, if I must make some choices, would be his net worth, his earnings, and his sophistication and investment experience; that coupled with the relationship again between the customer and the account executive, which is also a very important determinant in terms of whether or not there is either discretion in fact or whether the customer's man is directing or initiating the transactions in most or all instances.

Q Isn't this true, Mr. Marcus: That the most important question is the question of who is controlling the trade? Isn't that correct?

A That is what my last answer was.

Q That is the key question, right? Of course it is, isn't it?

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

A It isone of the essential elements that is considered.

Q And if the customer is the one who calls the turn and knows what he is doing there cannot be churning, is that correct?

A No, I don't agree with that statement.

Q You don't agree with that.

You were asked whether you considered the net worth of the Buckleys after everything was over, and you said yes; is that correct?

A Yes.

Q I suggest to you that that is entirely inappropriate under your own rules --

MR. SHAW: Objection.

THE COURT: Sustained as to form.

MR. MANDEL: This is cross, your Honor.

THE COURT: Sustained as to form.

Q Isn't it true that under your own rules the thing that should matter is the net worth of the Buckleys while the trading is going on?

A Certainly.

Q What information did you have in making your designations reaching opinions as to what the net worth of the Buckley's was during the period of 1962 to 1966?

A Only what was stated here in court.

Q In other words, nothing?

MR. SHAW: Objection.

THE COURT: Overruled.

A I think one can judge from the statement that was up there that some of those factors existed and also the information given in the hypothetical based on earnings and the stock that was given, that one can arrive at some feel perhaps for what the net worth was, not an exact figure, obviously.

Q Some feel. What was the net worth in the Merrill Lynch account, do you know?

No, you don't, right?

MR. SHAW: Objection, your Honor.

THE COURT: What is the basis of the objection, the speed in which the question is put?

MR. SHAW: It is based upon an improper assumption, that there is net worth shown in the Merrill Lynch account.

My understanding is that it's a margin account where there was a substantial debit.

THE COURT: The question is proper, and I will allow an answer.

Q What was the net worth of the Merrill Lynch account; do you know?

A No.

Q Did you try to find out?

A No.

Q You weren't concerned? You felt you could reach an opinion without that?

MR. SHAW: Objection. I move to strike that statement.

MR.GRUTMAN: He didn't try to find out because he couldn't reach an opinion about it.

THE COURT: Is that the fact?

THE WITNESS: I was answering the question prior to this. Prior to that there was no indication with respect to the questions asked with respect to a Merrill Lynch account.

Q But you failed to ask for a factor which you acknowledged to be very relevant; is that correct?

A It is relevant.

Q We are talking about hypotheticals. Suppose the Buckleys had $4,000,000 in the Merrill Lynch account. Will that change your opinion?

MR. SHAW: There is no basis in the record for asking that hypothetical. The hypothetical may only be based on facts shown in the record.

THE COURT: He is cross-examining as to what factors go into this.

I agree with you that this is not based on the record, but it seems to me that there has to be certain latitude.

I will sustain the objection to the question put in that form.

Q Did you make some assumptions about the Buckley account in reaching your opinion?

A The Merrill Lynch account?

Q Yes.

A Yes.

Q And you don't know whether they were right or wrong; is that correct?

A Based on the evidence here, I do not.

Q You said something about discretion in the accounts.

You are aware, are you not, that the Buckley accounts were not discretionary; is that correct?

A So I understand.

Q Did you take into account,or put it another way, what weight should you give to the fact that every single transaction taken in any of the Buckley accounts was specifically authorized in advance by Mr. Buckley?

MR. SHAW: Objection.

THE COURT: Overruled.

A Some but not a substantial amount.

Q Why not?

A Because, as stated again, as the evidence appears or as it was presented to me --

Q In the hypothetical?

A Yes.

MR. SHAW: The witness is being interrupted.

Q Are you considering the evidence --

MR. SHAW: Objection.

THE COURT: Let him answer the question, Mr. Mandel, please.

Q Go ahead.

A Most of the transactions were stated to be recommended or initiated by the customer's man.

Q What weight would you give to the fact that Buckley said no eight or nine times to every time he said yes to the recommendation of the customer's man?

A That would be a factor, but it still does not take away from the fact that the account was basically -- activity in the account was basically being initiated by the salesman.

Q And how do you equate those facts in any objective way, if you do?

MR. SHAW: Objection.

THE COURT: Overruled.

A It reduces some what the conclusion of control which you referred to before, but it certainly doesn't take away from it or eliminate it completely by any means.

Q My question to you,is there any objective measurable way, how do you equate those things? Can you go beyond generalizations?

MR. SHAW: Objection. You don't give numbers to ideas.

THE COURT: I don't quite understand that. Sustained.

MR. MANDEL: I withdraw the question.

Q Isn't it a fact that one of the most, if not the most important element in a question of churning is the aims and desires of the customer?

A It is an element. I certainly wouldn't say it is the most.

Q Where does it stand in the scale of importance?

A If you are asking me personlly my opinion, it's an important element, but not one of the most important.

Q Is that your personal opinion or is that the general opinion in the industry?

A I think it's the general opinion in the industry. It's not one ofthe top two or three. It's not of the standing of the ones I mentioned earlier as being one of the most significant or important.

Q I ask you to assume that Mr. Buckley was an aggressive, speculative trader. That was his objective. His objective was to make gains, and he didn't care if they were long-term or short-term, and he was not interested in income, and he was willing to take risks; would that effect your opinion in any way?

A It wouldimpact somewhat on what I would consider the acceptable rate of turnover, but I would also look at his desire as a function of his other factors, again, income, net worth and the other factors.

Q In looking at a proper turnover ratio, would you be influenced in any way by the knowledge that the customer, an aggressive speculator, had paper profits of $300,000 or $400,000 or $500,000 in his hands after an investment of $100,000 or $200,000?

Would that affect the proper turnover ratio in your mind?

A Again, to the extent that it affects his net worth at that moment and, as I indicated, net worth is an element in defining what is an acceptable rate, then it would indirectly go into the determination.

Q I don't think you ever told us --

MR. SHAW: Objection, your Honor.

THE COURT: Complete the question.

Q I don't think you ever told us what you thought, what your opinion was as to the acceptable turnover ratio for the Buckleys.

MR. SHAW: Objection, your Honor.

THE COURT: It's objectionable in form, but I will allow it as being, I take it, does he have an opinion as to the acceptable turnover rate for the Buckleys.

MR. MANDEL: Right.

A Up to perhaps two times on an annual average basis.

Q Is that true for the whole period?

A It might be somewhat lower earlier in the period when he had slightly lower earnings and net worth and perhaps reaching the two times level toward the end when he had higher earnings, certainly, and the net worth or his net worth was somewhat more presumably.

Q Is it your opinion, sir, that there is an upper limit of capital turnover which is absolutely applicable to anybody in the world?

A No, I suppose depending on the circumstances it might be that an excessively high rate would be acceptable for a given individual.

Q In your opinion, is trading legal in the stock market?

MR. SHAW: Objection.

THE COURT: Overruled.

You may answer.

A I take it you mean active trading?

Q Yes, I mean active trading.

A Is it legal?

Q Yes.

A In and of itslef I really can't answer that question. I think it's got to be related to, again, the context.

Q Well, Mr. Marcus, aren't there hundreds of thousands of trading accounts in Wall Street?

A There are many. I don't know how many.

Q And these are accounts where people go in and buy today and sell tomorrow and buy today and sell tomorrow, and they look for opportunistic profits; isn't that right?

A There are certainly some such accounts.

Q What is the proper turnover ratio for such accounts? There is none?

A I don't think that can be answered in a vacuum.

MR. GRUTMAN: Objection. He was about to make an answer, and he pounced on him.

MR. SHAW: He asked the question and said there is none. It's summation again.

THE COURT: Let's see what the witness says.

A I don't think that can be answered in a vacuum, again.

Q You don't think it can be answered effectively?

A In a vacuum. In other words, such trading might be proper for certain people. It certainly would be improper for most people.

Q Is it proper for people of high education?

A It depends more on the nature of the education.

Q Is it proper for people who have been in the stock market and studying it for four, five years?

A That is a factor.

Q Is it proper for people who have great wealth or the expectation of great wealth?

MR. SHAW: Objection.

THE COURT: Overruled.

A I draw a distinction between expectation and in fact great wealth.

Q Is it proper for people of competence and education who wish to speculate and take chances?

A Again, that is a factor which would have to be added in or arrived at.

In other words, if that is one of the factors along with all the others that we are putting together.

Q What number would you give to the factor?

MR. SHAW: Objection, your Honor.

THE COURT: Answer the question. Education and competence, and he wants to speculate and take risks; is that roughly your question?

MR. MANDEL: Yes.

A Education and competence, meaning experience in investing?

Q Yes.

A Somewhere in the middle, upper middle, on a scale of 13, perhaps 4, 5 or 6.

Q You have been talking, I think, in your opinion, about practices in your company as you understand them; is that correct?

A Both my company and the industry as I know it.

Q Is it fair for me to say that in reaching your practices and the industry practices, the industry is trying to be self-protective and not walk up to the boundaries of what is legally permitted; is my question clear to you?

MR. SHAW: Objection.

THE COURT: I will sustain the objection as to form.

MR. MANDEL: I will try it another way.

Q These practices that you have been talking about in the industry are not designed or are designed to be sure, as far as possible, to keep the companies from getting into trouble; isn't that right?

MR. SHAW: Objection, your Honor.

THE COURT: On what ground?

MR. SHAW: He is be[illegible] asked not to indicate what the practice is but what the motive in the industry for the practice is.

He can't testify as to motive.

THE COURT: I take it he wants to get down as to whether this is a conservative or liberally applied rule which bears on the weight that the jury should give to the witness' opinion, am I correct?

MR. MANDEL: Precisely.

THE COURT: I will overrule the objection.

Are you aware of the general area, Mr. Marcus, that we are inquiring in now?

THE WITNESS: Yes.

A I think it has a twofold derivation. One is the point you are making, and theother is that certainly the majority of firms in the industry have what they feel to be the vest interest of their client at heart, and if they feel that a practice or a course of conduct is not in the best interest of a client, they also design their practices with that in mind as well. It's a dual factor.

Q They also have in mind, do they not, that if they are not careful, there will be some unfortunate speculators who will come around later and claim that they were wronged by the company in trying to avoid the losses, whereas they would have been very happy to go home with the profits; isn't that right?

MR. SHAW: Objection.

THE COURT: Sustained.

I gather this has been answered already in the statement that it was a conservative rule?

THE WITNESS: That is correct.

Q As a conservative rule, it does not attempt to advance as far as the law might allow; is that correct?

MR. SHAW: Objection. That is for you to say.

THE COURT: Sustained.

Mr. Mandel, would this be a good time to break for lunch?

MR. MANDEL: Yes.

THE COURT: We will take a recess until 2:15.

(Luncheon recess)

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AFTERNOON SESSION

2:15 p.m.

(Trial resumed)

(In open court - jury present)

DAVID MARCUS, resumed.

CROSS-EXAMINATION (Continued)

BY MR. MANDEL:

Q Mr. Marcus, am I right that you said before lunch, assuming that the Buckley's account was an aggressive, speculative trading account, you would still feel that the maximum permissible capital turnover per annum would be two; is that correct?

A Approximately, and based on other factors as they have been expressed, yes.

Q And it would be approximately .5 or 1/4 per quarter; is that right?

A Yes.

Q Are there any books or manuals or data of any kind you can refer to in this connection?

A There have been articles written from time to time, law review articles, certain statements that have been made at the industry group discussions, panels, seminars.

Q I am not asking in general has there been literature. I am asking for literature to substantiate your figure of two times a year as the maximum capital turnover.

Do you understand that question?

A Yes.

Q Can you answer that question directly?

A The articles that I am familiar with don't generally give a specific figure, but give again approximations of what have been found in different situations.

MR. MANDEL: I move to strike.

THE COURT: Strike it out.

Q My question is: Can you name one thing which substantiates your figure of two?

A Any one specific item?

Q Yes. I am being as broad as possible, an internal memo of your firm, a memo of the stock exchange, anything you know about to justify this figure of two which you are promulgating to this jury.

MR. SHAW: Objection.

MR. GRUTMAN: May we approach the bench?

THE COURT: Overruled.

(At the side bar)

MR. GRUTMAN: Your Honor, I was under the impression that Mr. Bialkin was going to come and

MR. SHAW: How long will you be?

MR. MANDEL: It depends on what he says. I think it will be substantially more.

THE COURT: I will have to take him in fifteen minutes or whenever you reach that point.

(In open court)

BY MR. MANDEL:

Q Do you recall the last question, Mr. Marcus?

A Yes, I do.

Q Can you give me an answer?

A Yes, there are a couple of sources that I can think of. One I happen to have a copy of an internal policy memorandum of Merrill Lynch's put out by their general counsel in 1972 that refers to a figure of slightly in excess of two times. There are also cases cited in an article, the Harvard Law Review article --

Q I am not asking about --

MR. SHAW: That was the question, "Do you have anything thatwas written?"

I object to cutting the witness off in the middle of a responsive answer.

THE COURT: You may examine yourself if matters don't come out that you feel are relevant.

Q I am asking other than legal documents. By the way, will you produce the Merrill Lynch paper?

THE COURT: Mark it for identification, please.

* (Defendant's Exhibit M was marked for identification.)

MR. MANDEL: I offer it in evidence.

MR. SHAW: I object to this document.

THE COURT: What ground?

MR. SHAW: I think it is similar to giving the jury a written summation of the law or the charge of the Court to take with them into the jury room. It contains much law, many more things in this document other than the [illegible] of two times.

MR. MANDEL: This is a document this witness relies upon. It's not a case. It's an internal memorandum.

MR. SHAW: That is not the witness's --

THE COURT: Let me read it first, please.

It seems to me that with the exception of two places, this ought to go in.

Has somebody got a colored marking pencil?

Mr. Shaw, I will take out, in any event, the paragraph marked in red on page 1.

MR. SHAW: May I see it?

THE COURT: Yes. Why don't the two of you look at it together.

I question the paragraph that I put a checkmark next to on page 2, although reasonable men can differ on that.

MR. MANDEL: I take it, your Honor, you have marked out one portion.

THE COURT: The paragraph on the top of page 1, given Mr. Shaw's objection, I will exclude.

MR. MANDEL: You are asking Mr. Shaw's position on the paragraph next to the checkmark?

MR. SHAW: I object to the receipt in evidence of the entire document, including the paragraph you have checked.

THE COURT: On what ground do you object to the balance of it?

MR. SHAW: Upon the ground that this is law, that it should come either from the opinion testimony of the expert or from the charge that the Court gives at the end of the case. It should not be in the form of an exhibit that the jury has before it.

This is not the proper way of getting the law with respect to churning in evidence.

THE COURT: This is not being offered for law. This is being offered as a basis of the witness's claim of expertise and the factors he has asserted go into his opinion and is being used as an instrument that he has considered in that regard.

THE WITNESS: I would like to speak further on that point.

MR. SHAW: As I understand the state of the record, he relies upon this as well as other documents for his position that a two times ratio of turnover of capital if exceeded is excessive.

This document speaks of many, many different cirteria with respect to churning, and it seems to me this should come from your words to the jury at the end of the case.

THE COURT: This gentleman has given a factual statement as to what he understood churning to mean in the trade, a statement of fact.

This memorandum, in large measure, is a definition of that fact in a memorandum put out by Merrill Lynch.

Am I correct?

THE WITNESS: Yes, but this was not really the basis of my expression of the two times ratio.

THE COURT: Whether or not it is that, is this not an instrument that is afloat in the field containing definitions as to this area, specifically definitions as to which a major brokerage house put its imprimatur?

THE WITNESS: The latter part is true. I don't know if this is afloat.

BY MR. MANDEL:

Q It's a document you relied on?

A No.

Q You just testified --

A No, you asked me if there was something I knew of that expressed a two times ratio. This is something I recently received after I formulated such an opinion.

MR. SHAW: One further statement. There are many documents, many textbooks, many treatises afloat in the field.

I don't think they should be palced in evidence. The definition of churning should come from you.

THE COURT: That is unquestionably so and will happen in the end of the case, but we are examining an expert who has given us his exact definition of churning. I have it written down, what he says churning is.

This memorandum contains such a fact definition by a brokerage house; am I correct in that?

MR. SHAW: That is correct.

THE COURT: Maybe the foundation isn't laid for its entire admissibility, and maybe that may develop during the course of the afternoon, but it doesn't seem to me that this impinges on my duties as a judge to instruct on the law.

MR. MANDEL: I agree with that, your Honor.

THE COURT: Go forward with this at this point, and if you want it in, lay a foundation for it.

Certainly it goes in to the extent that it bears on the two times ratio.

BY MR. MANDEL:

Q I asked you if you had anything to produce to show the two times ratio, and you mentioned this document; right?

THE COURT: What is this exhibit?

MR. MANDEL: M.

Q And you mentioned M, is that correct?

A That is correct.

Q And I asked you to produce it, and you did in response to that two times ratio.

Will you show me please where M mentions the two times ratio?

MR. SHAW: Referring to paragraph 3, page 2.

Q Did you have in mind this paragraph -- and let me identify the document first.

MR. SHAW: Objection, your Honor.

MR. MANDEL: I will ask the witness.

jq ja

THE COURT: Overruled.

Q This is a document from your file; right?

A Yes.

Q And it is your file as an expert in the compliance field, right?

A Yes.

Q And it's an industry document which came to you through industry sources; it that right?

A Yes, sir.

Q And it is dated February 22, 1972; is that correct?

A I believe that is correct.

Q I think you identified it as coming from Merrill Lynch; right?

A Yes.

Q And it was intended for the guidance of people in Merrill Lynch and the industry; is it not?

A Of eople at Merrill Lynch, employed at Merrill Lynch.

Q How did you happen to get it?

A Through someone else within my firm.

Q And you thought it was valuable enough to keep for reference; is that correct?

A Yes, obviously.

Q And authentic enough to mention here as a basis for your opinion?

A It is not a basis for my opinion.

Q You say it's some substantiation for your opinion?

MR. SHAW: Objection, your Honor.

MR. MANDEL: Withdrawn.

THE COURT: All right.

Q Is it true that this document mentions various of the criteria which you mentioned in your direct testimony, including turnover rate?

A I believe it does. I haven't looked at it recently.

Q I read this paragraph --

MR. MANDEL: I would like to read into evidence, your Honor, beginning right with the beginning of that.

MR. SHAW: Objection, your Honor.

THE COURT: Let me see the paragraph.

MR. MANDEL: I would like to start here and read the whole thing.

(At the bench)

MR. SHAW: My objection is that it is a four or five-page memorandum. There may be a statement in here which is going to be exalted and given prominence that it should not receive, and which would be able to be mentioned by Mr. Mandel during his summation with respect to an area of law.

It is possible that whoever wrote this document disagrees in some minor respect that is going to be magnified beyond the degree it should be magnified.

That is the reason I object to the receipt in evidence or the reading of this, document.

I am sure there is some tidbit there Mr. Mandel is relying upon which may very well not be correct.

THE COURT: Mr. Mandel, given the objection, I am going to have to ask that you ask him whether or not he agrees with certain portions of this or disagrees with them, and what bearing they would have upon his answer.

MR. MANDEL: All right.

THE COURT: We will have to do it in a little harder fashion.

(In open court)

THE COURT: Keeping in mind our side bar of a few moments ago --

MR. MANDEL: I have one other thing to do after this.

BY MR. MANDEL:

Q Mr. Marcus, do you agree with the contents of

Exhibit M?

A I've not read it carefully enough or recently enough to be able to answer that question.

Q Do you regard Exhibit M as authority for your use of a two times ratio?

MR. SHAW: Objection.

Q Do you base your opinion on Exhibit M that two times is appropriate?

A That was a conclusion I reached before that document came into my possession, which was only fairly recently.

Q Do you have any otherdocuments in connection with using two times as an outside limit for capital turnover?

A If you mean documents such as memoranda of this nature or articles, none that specifically mention a two times figure as the given figure.

Articles don't generally speak in those terms.

MR. MANDEL: With this background I will offer the whole thing. I will not read it at this time. If it is accepted -- I think it should be in evidence.

MR. SHAW: I object to the document.

THE COURT: I sustained that objection at the side bar.

There are other ways to utilize this exhibit, but I do not believe it should go in in that form.

MR. MANDEL: I may come back to that because I want to do one other thing in order to keep up with the time schedule your Honor has mentioned.

There is one thing I want to do immediately so I am moving away from this for the moment.

Mr. Rothman, will you go to the board, please -- Mr. Marcus.

BY MR. MANDEL:

Q I am going to give you a hypothetical series of transactions so that we can illustrate or see what we are talking about with regard to capital turnover, and if you can't follow me, speak up.

Let us assume first that on January 3rd, a customer puts $10,000 into an account. And on January 4th, the customer buys $10,000 worth of X stock.

On May 3rd, the customer sells that $10,000 worth of X stock for the same price at which he bought it, for whatever reason or whoever's suggestion, and simultaneously buys 10,000 shares of Y stock, that is, $10,000 worth of Y stock; and then on July 3rd the customer sells his $10,000 of Y stock and buys $10,000 of Z stock.

We understand each other. This is three buys and three sells with no profit or loss.

THE COURT: There is not a third sell on that board.

MR. MANDEL: All right. Add the third sell, July 4th.

Q We will assume that despite Independence Day, the exchange is open for this very important transactions.

Would you say the customer has been churned?

A I don't have enough facts to answer that question.

Q What has the capital turnover been as a result of this three buys and sells?

A For the period given, three times -- that is not an annual basis, it's about half a year.

Q Three times and two quarters, right?

A Yes, six months, two quarters.

Q So that on an annual basis it's a six times turnover?

A Correct.

Q On an annual basis, this is three times what you would consider to be churning; is that right?

A Again, given the other factors that I would include in a churning analysis, yes.

Q And even if this is a person who is a rank speculator, who wants to use -- wants nothing but gains, wants leverage, though we haven't used it, there is no margin, you say this series of transactions constitutes a six times capital turnover?

MR. SHAW: Objection.

Q On an annual basis?

THE COURT: Overruled.

A Yes. That is a six times annual turnover.

Q As you figure it, ,

If the customer employed 50 percent margin on these transactions, am I right that as you calculate it, it would then become a nine times annual turnover -- or, rather, a 12 times annual turnover?

A Yes, 12 times.

Q And these simple transactions --

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

You understand what he is talking about?

THE WITNESS: Yes.

Q These simple transactions, if done with margin in a speculative account, according to your testimony, is six times the permissible trading?

THE COURT: 12 times. Done with margin you say.

MR. MANDEL: Two is allowed, so it's a multiple of six.

THE COURT: You are leaving out all the other factors that go into churning. You are taking the turnover rate only.

Q I tell you that the customer wants to do it.

MR. SHAW: Objection. We are now arguing with the witness.

THE COURT: Overruled.

Q At any rate, that is what you are talking about when you say a turnover of two is the most the Buckleys were allowed.

MR. SHAW: Objection. This is not what the witness said. He is arguing with the witness.

THE COURT: I overruled that objection. We are establishing what the turnover factor means in this witness' testimony.

Overruled.

A This is what would amount to the turnover rate that you indicated, three times, in other words.

Q When you say that the Buckleys on average were turning over their account about five times a year?

A It averages out about five times in excess.

Q Half of this kind of turnover, if done on margin, then, right?

MR. SHAW: Objection.

THE COURT: Overruled.

A If done on margin?

Q Yes.

A It's not really comparable unless you put the figures in, but based on what you are trying to say, the answer would be presumably yes.

It's really twice as many dollars or purchases on a margin basis than you show here.

Q But the fact of the matter is when you examined the Buckley account you saw that they were using margin accounts quite heavily, right?

A Yes, they were.

Q All the way. And you assumed, at least in answer to some of the questions, that they wanted to do that and wanted to use leverage as much as possible; is that correct?

A Well, I assumed as stated that Mr. Buckley was approving the purchases.

I don't know necessarily that he had indicated an investment intent of active trading.

Q You can see that from the ledger sheets, can't you?

MR. SHAW: Objection.

KENNETH J. BIALKIN,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Are you an attorney duly licensed to practice law in the State of New York?

A Yes, sir.

Q Will you tell us the name of the firm with which you are affiliated?

A I am a partner of the firm called Willkie, Farr & Gallagher.

Q And your offices are located where?

A One Chase Manhattan Plaza.

Q As a member of thatfirm, is there a particular area of expertise in which you practice?

A Well, I do a lot of corporate, financial and securities work.

Q Is the Willkie, Farr firm a general practice firm?

A Yes, sir.

Q How large is the firm?

A We have somewhat in excess of one hundred lawyers. There are 38 partners.

MR. MANDEL: Would you speak up a little bit please?

A It varies seasonally, somehow, but we hover between 100 and 110, I would say, practicing laweyrs, exclusive of paralegals or assistants.

Q From what law school were you graduated?

A Harvard.

Q What is the year of your graduation?

A 1953.

Q Will you trace for us, if you would, please, what your past professional background has been since your graduation from Harvard, including whatever specialty training you have had and firms with which you have been associated, what organizations or societies in which you are a member, what boards or commissions you have participated in the work of, and what organizations you belong to and what honors have been conferred upon you; and please don't be modest?

A I have been with the same firm since graduation from law school in 1953 continuously.

I initially was an associate and thereafter as a partner. The firm had a series of names going back into history; several names since I have been there.

My work has, I would say, been in a progression of responsibilities, largely -entering in client responsibility, generally for clients engaged in the corporate or financial area.

Since 1966, approximately, I have been teaching federal securities law at the New York University School of law, where I am an adjunct professor.

I am now chairman of the Federal Regulation & Securities Committee of the Section of Corporation, Banking and Business Law of the American Bar Association.

Q Is that a national responsibility?

A Yes, sir.

Q Besides the teaching that you do and the work which you do in the American Bar Association on the Committee on Securities Regulations, are there any other bar association activities with which you have been affiliated or connected, either at the association --

A Do you want me to expand?

Q Yes.

A I am a member of the board of directors of the New York County Lawyers Association; chairman of that association on the securities and exchanges committee, the chairman of that association's Special Committee on Committees.

I am chairman of the committee to study foreign investments in the United States of the Section of Corporation, Banking and Business Law of the ABA, again.

Member of the Committee on Counsel Responsibility and Liability of the ABA; that is the Corporation, Banking, Business Law Section, members have variety of others.

Q Please tell us what the associations are.

A I am a member of the Association of the Bar of the City of New York, and although I don't have any committee memberships there at this time, I have been in the past on the Committee of Uniform State Laws, and on the Committee of Housing and Urban Development.

I am a member of the New York State Bar Association. I have never been a member of a committee of that association.

Q Do you write articles or have you authored or contributed to any periodicals having to do with subjects on the area of your special interest?

A Yes, sir. I lecture quite a bit, quite often before continuing legal education forums sponsored perhaps by the American Bar Association or the Practicing Law Institute or the New York Law Journal, all of whom I have either lectured on or chaired programs generally concerned with matters in the securities law.

Q When you do that kind of work, Mr. Bialkin, are you lecturing to other lawyers, on the area of your specialty?

A Normally, yes.

Q In the Willkie, Farr firm in which you are not a partner, and you have been a partner in that firm since what year?

A Either '60 or '61, I am not sure.

Q How large is the corporate department in that law firm?

A We don't keep track of it that way. The corporate department, so-called, is the residual part of the firm after you exclude out the people who do taxes and the people who do litigation, and the people who do trusts and estates.

I would guess, and it's only a guess, that about half the firm would be involved in corporate matters.

Q That would be about 50 of the 100 or so lawyers that comprise your law firm; correct?

A Yes, sir.

Q Is there a pecking order, so to speak, or a hierarchy or seniority in the Willkie, Farr firm?

A Not officially.

Q Unofficially, where do you stand in the activities or ranking of those among the fifty lawyers doing corporate work?

A Well, I would be regarded as one of the senior people.

Q In the year 1970 do you recall whether or not Willkie, Farr & Gallagher represented any clients that were involved in a transaction having to do with a brokerage house called Newburger, Loeb & Company?

A Yes, sir.

Q Do you recollect the names of your clients?

A They were Milton and Irving Lobell and a gentleman named Dworkin who had been in accounting for the Lobells.

Q Was that Mr. Albert Dworkin?

A Yes, I think so. I might say it's a long time ago, and I don't have a clear recollection.

Q To the best of your ability, drawing upon your memory of these events, I would like you to tell us, if you can, and if you do remember, what these clients of yours, the Messrs. Lobell and Dworkin, were in respect to the brokerage house of Newburger, Loeb & Company.

A As I recall, these were clients who had not been previously regular clients of ours. They were recommended to us by another client who asked us if we would assist these people in their then difficulties with the firm of Newburger, Loeb.

They, to my recollection, were customers of thatfirm who had subordinated their accounts with the firm. That is, they had taken the securities that they owend, placed them with the firm, and had agreed with the firm that the firm could use those securities as its own for purposes of compliance with various fiancial capital needs of the firm, the effect of which would be to make our clients subordinated to the claims of other customers and perhaps creditors of the firm.

The difficulty was that Newburger, Loeb was then in financial crisis, as I understood it. Our clients' subordination agreement was expiring. I don't know exactly when, perhaps at the end of the year or shortly thereafter.

Our clients were concerned about getting their money back or at least getting their accounts back when the period of subordination had ended.

They had been told by the firm that the financial position of the firm was such --

MR. MANDEL: I object to this.

THE COURT: Sustained.

Q Your clients were subordinated lenders; is that the phrase which describes their category?

A That is the general phrase that is used.

In fact, I think they had subordinated accounts, but we use the phrase "subordinated lenders" to cover all people so situated who are subordinated either by means of a direct loan or by the placing of an account.

Q As an adjunct professor of law, I will ask you to tell us in shirtsleeves English if you will, whether or not there is a gradation in order of priorities as to people in a partnership on the satisfaction of their claims as between subordinated lenders, limited partners, and general partners; is there?

MR. MANDEL: One moment, please. This depends on the facts of a particular case, and in this case we are confronted with withdrawn general partners as well.

THE COURT: Why don't you save that for cross-examination.

MR. MANDEL: The witness is not being asked to testify about this case. He is being asked to testify in general, which is irrelevant.

THE COURT: He has been given three categories.

MR. MANDEL: We are concerned only with this case, your Honor.

THE COURT: Are there three categories in this case?

MR. MANDEL: Four or five.

THE COURT: At this point I will let you examine as to the three, and Mr. Mandel may examine further as to the two more.

Overruled.

BY MR. GRUTMAN:

Q Of the three categories that I propounded to you, subordinated lenders, limited partners, and general partners, was there a hierarchy in terms of the priority or preference that those three cateogires would have by way of satisfying claims?

A In the event of a liquidation of the partnership, generally creditors would have a right to be paid before partners.

It of course depends on the terms of whatever agreement may have been entered into among them, but under general legal principles, a creditor, even a subordinated creditor, would be entitled to be paid out before the partners of the firm, whether limited or general.

MR. MANDEL: Shouldn't we have the documents in evidence, your Honor?

THE COURT: Overruled.

Q Would subordinated lenders' claims come ahead of limited and general partners?

A In the usual case, yes.

Q Would limited partners' claims be superior to general partners' claims in the usual case?

A I can't answer that question.

In the usual case I would say they would not be. To the extent of the capital put into the firm, that is. The different between a limited partner and a general partner is that a limited partner's liability cannot exceed the amount he has put up.

To the extent he has put it up and it's eroded or disappears, it's gone the same as any general partner's claim.

If there are liabilities beyond that --

MR. MANDEL: Please, I hate to interrupt.

I certainly have the greatest respect for the witness. I would like the record to note a continuing objection to general conversation apart from the facts of this case and the documents and the rights and liabilities of this case.

THE COURT: Mr. Mandel, to the extent that a question is asked which has no possible support in this record, I will sustain the objection to it. But it seems to me to be -- well, we have a situation involving three categories that Mr. Grutman asked about. The witness is being asked to give a sorting out of those.

If there are no such categories or unusual equals here, that is another matter.

MR. MANDEL: Do we understand that the witness is talking about the Newburger, Loeb situation?

THE COURT: He is defining rights as between the terms given him by Mr. Grutman; nothing more.

BY MR. GRUTMAN:

Q You said a limited partner to the extent the limited partner has put capital up has that capital, subject to its having already been eroded, at risk; is that what you say?

A In my experience, that would be the normal case unless there would be an agreement in the partnership agreement which specified otherwise.

Q How about a general partner?

A A general partner has his capital up normally and his responsibility goes beyond his capital.

If the firm has liabilities or losses which have wiped out its assets and it goes into deficit, at that point the difference between a limited partner and a general partner is that the creditors of the firm normally have the right to seek their claims against the general partenrs to the extent that they are unpaid, but not the limited partners.

Q In going against the general partners, would creditors be able to go just the amount of the committed capital, or against their net worth?

A Again, as a matter of general law, a general partner stands responsible for, the entire debts and liabilities of the partnership to the extent that they occurred in the course of partnership business.

Q About seven questions ago, you made reference to the fact that these clients, the Lobells and Mr. Dworkin, advised you of the existence of what you described as a crisis of the affairs of Newburger, Loeb.

Do you remember that?

A Yes.

Q I call your attention to Exhibit 1 in this case, a letter from the New York Stock Exchange, Deaprtment of Member Firms, addressed to Newburger, Loeb, under date of November 17, 1970, which stated in part on page 2:

"Under the circumstances and in view of your impaired capital position and loss trend, this Department is left with no alternative but to approach the Board of Governors and ask for your suspension under Article 13 of the Exchange Constitution, if your required excess capital is not met by the close of business on November 20, 1970."

It went on to state:

"You are directed to take every possible anticipatory step to prepare for possible liquidation of your firm, such as discontinuing any purchases for your firm trading in investment accounts, liquidating proprietary positions and other administrative procedures in the event of a suspension by the Board of Governors."

Was the general substance of that letter made known to you by your clients?

A I don't recall seeing the letter or knowing of the letter.

All I did know is that they were told that their money was at risk and the firm is not in the position to repay them. They were concerned about their investment.

MR. MANDEL: I am going to object to what the clients were told that they told to Mr. Bialkin. It is double hearsay.

MR. GRUTMAN: It's on the issue of good faith, your Honor.

THE COURT: I don't see it affects any issue one way or the other.

I will let it stand.

BY MR. GRUTMAN:

Q Subsequent to your firm being retained, did you participate in behalf --

THE COURT: This is not being admitted for the truth of the contents but for what Mr. Bialkin was advised.

Q Did you participate in various conferences and negotiations looking to a resolution of your clients' predicament in the context of what was described as the crisis of Newburger, Loeb?

A Yes, I participated in several, but not all.

Q I will try to compress this if I can.

Would you in your own words tell us when your involvement in the matter began and what your participation consisted of over the course of time that you participated in activities affecting your clients at Newburger, Loeb, and what was done?

A Yes, I can try.

Being fairly busy, most of the matters that I work on in the office are usually worked on in association with one or more other lawyers in the firm.

In this case, there was a lawyer named Charles Lewis, who was a senior associate in our office, who had worked with me previously on other brokerage firm liquidation problems and was quite experienced.

To a large extent I depended on Mr. Lewis for a lot of work in the transaction.

I was in general supervision, which consisted in the early days of conferring with our client, analyzing our clients' legal situation and position, assisting the client in evaluating the financial position of Newburger, Loeb and in analyzing the proposals that were then being made for the reorganization of the entity, which, as I recall, involved the organization of a new corporation which would succeed to the business.

The essential question that we were advising on, and it was a mixed question of law and business judgment, was whether our clients should go along with the proposal then being made to reorganize the firm and form a new firm or take a rigid position and say, "We will not agree to any modifications of our agreement. We will insist on our rights. We will sue to get our money back. We will force the company to liquidate."

And the question that we had to analyze was whether, if we would force a liquidation our clients would end up with more money than if they agreed to the reorganization.

So we had to analyze it both ways. If there was a liquidation, how much would our client end up with, assuming that there was litigation, and at the end of the line we were correct in our appraisal; or if there was to be a reorganization, what were the prospects of the business succeeding so that our client would see some value in the reorganization.

MR. MANDEL: May we approach the side bar.

MR. GRUTMAN: Can we finish the answer?

MR. SHAW: Is there an objection?

THE COURT: You are objecting?

MR. MANDEL: Yes.

THE COURT: Sustained.

BY MR. GRUTMAN:

Q Did you consider what your clients' position would be if they insisted on their rights and forced a liquidation?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Did you make any inquiry into the solvency of Newburger, Loeb at the time your clients approached you?

MR. MANDEL: Objection.

THE COURT: I take it this is going to certain issues of good faith.

MR. GRUTMAN: That and nothing else.

THE COURT: How does this question bear upon that?

MR. GRUTMAN: It has to do with the establishing of the foundation on which the transfer agreement was agreed upon by the parties who participated, and I think it is highly relevant to understand what considerations motivated the various elements of the groups that comprised that agreement as to why they went along with it, and it certainly supports as an essential underpinning this issue of good faith.

THE COURT: Isn't the only relevant question the validity of a certain opinion that was given on the night of the closing?

MR. GRUTMAN: Not at all, in our opinion.

THE COURT: But your opinion and mine in that regard may vary to some extent.

MR. GRUTMAN: Certain authorities that we submitted to you in our memorandum support the position we have taken, and they are from very eminent courts.

THE COURT: As you are aware, I propose to rule or I have ruled on the effect of partnership agreement, section 98.

The question isn't as to what the law is. It's a question of the good faith of the letter concerning it on the night of the closing.

MR. GRUTMAN: Very well.

THE COURT: You should get there as quickly as possible.

MR. MANDEL: I don't think Mr. Bialkin was present at that time.

MR. GRUTMAN: You chastised me this morning for saying things out of turn.

I think Mr. Mandel deserves a rebuke for what he is doing in the examination.

THE COURT: I trust that everybody would profit by what I said regardless of which way it is directed.

Mr. Mandel, that applies to you as well, sir.

MR. MANDEL: I accept the rebuke.

BY MR. GRUTMAN:

Q Mr. Bialkin, were the negotiations that led to the formulation of the reorganization of Newburger, Loeb from a partnership into a corporate form conducted over a number of months?

A I don't recall the time frame. I have the impression that they were at least several weeks.

Q Were there meetings held in which there were discussions and negotiations held between the various people involved?

A Yes, sir.

Q Were these meetings held openly?

MR. MANDEL: Objection.

THE COURT: Overruled.

A As far as I was concerned, they were open. If I was invited to attend, I attended.

Q Was there anything clandestine or secretive about the meetings?

A Not to my knowledge or belief.

Q As to the formulation of the terms of the agreement hammered out in negotiation, were there drafts of these agreements that were being circulated among the various law firms representing the people involved?

A Yes, sir.

Q Was your firm one of the firms that participated in drafting language that found its way into the ultimate so-called transfer agreement?

A We received generally drafts prepared by others on which we either agreed or disagreed or commented, and we may have proposed alternatives to portions that were not acceptable to us, yes.

MR. MANDEL: Your Honor, would it be appropriate to ask that Mr. Bialkin's testimony be restricted to his personal knowledge and not to matters that he heard from

Mr. Lewis.

THE COURT: I don't think I am going to do that at this point. Knowledge of the firm at this point is knowledge to him.

Q As the supervising partner in charge of the matter did Mr. Lewis report to you about the progress of negotiations that were going on?

A Yes, sir.

Q Were these what are called arm's length negotiations?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q What are arm's length negotiations?

A Arm's length negotiations in my mind means negotiations in which the parties engaging in them are acting each in their own best interests and have no conflicting loyalties or claims which might impair their judgment.

Q How would you characterize the way in which these negotiations involving the reorganization of the Newburger, Loeb firm were being carried out?

THE COURT: Sustained.

You haven't yet laid a foundation of his position to make lthe sweeping generality in that question.

Q Were the subordinated lenders each represented by their own counsel?

A You mean the subordinated lenders other than my client?

Q Yes.

A It's my impression they were. I don't have a catalog of who they were. There were an awful lot of lawyers in the room.

Q Do you recollect how many law firms there were, sir? Does the number 17 ring a bell in your mind?

A 17?

Q 17 different law firms?

A That would exceed the number that I thought were involved.

Q How many did you think were involved?

A I never took a census, but I would say I would have thought there were at least a half dozen, at least that we interfaced with in one way or another when we were at a meeting and other people were present.

Q Did you try in the meetings in which you participated to work out some kind of a formula that would be acceptable to all sidesj

A I participated in the discussions when there were disagreements as to terms.

Q Were these disageements ultimately resolved, down into a proposal that was submitted for the signature of the general partners, limited partners and the subordinated lenders?

A Yes, sir.

Q I show you a document.

MR. GRUTMAN: May this be marked for identification.

* * * (Finley, Kumble Exhibit C marked for identification.)

Q Would you take a look at Finley, Kumble Exhibit C for identification.

Do you recognize that document?

A Yes.

Q Is that a letter which you wrote on or about December 31, 1970?

A It's a copy of a letter, the second page of which has my signature on it.

Q Or a facsimile thereof?

A Yes.

Q Was the letter written to Newburger, Loeb & Company?

A Yes.

Q Was it written on behalf of your clients?

A Messrs, Irving Lobell, Milton Lobell and Albert Dworkin.

Q Did you convey to Newburger, Loeb & Company by that letter.

THE COURT: You are asking him to read from something not in evidence.

Q Did that document reflect the position of your firm on behalf of your clients,with respect to the proposed reorganization?

A This letter said that we were prepared to --

MR. MANDEL: Let him read the letter.

MR. GRUTMAN: I offer it in evidence.

THE COURT: It will be received.

(Finley, Kumble Exhibit C for identification received in evidence.)

THE COURT: Do you have a copy?

MR. GRUTMAN: I don't, your Honor.

MR. SHAW: What date is it?

THE WITNESS: December 31st..

Q By the terms of that letter, you expressed a willingness on behalf of your clients, the Lobells and Mr. Dworkin, to become a party to the proposed transfer agreement; is that not correct?

A It refers to a draft agreement dated December 31, 1970 that was submitted to us. We say that subject to certain exceptions, we were willing on behalf of our client to enter into the agreement if it were changed as provided in the four points that we mention here.

Q Do you recollect whether or not subsequent to your having sent that letter certain stylistic or semantic changes were made or certain substantiv e changes were made, and it was agreeable to you on behalf of your clients?

A I can't tell you what changes were made and what changes weren't made, but there were some changes made, and ultimately the papers were agreeable to our client, and we signed and closed.

Q In the course of the negotiations in which you participated, did you ever hear the name Charles Gross mentioned?

A I don't recall specifically. I think the answer is yes, although I don't have any specific recollection of Mr. Gross.

Q Searching your recollection, do you recollect whether or not Mr. Charles Gross in the course of the negotiations was asking for some kind of special treatment?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Do you recollect any demands that were being made by Mr. Gross during the negotiations that went on before the transfer agreement was drafted?

A Well, I do recall, and this is primarily through conversations with Charlie Lewis --

MR. MANDEL: At this point, your Honor, I believe that a hearsay objection is in order.

THE COURT: Sustained.

Q I show you another document which will be marked for identification.

* (Finley Kumble Exhibit D was marked for identification.)

Q I show you a document marked Exhibit D for identification under date of February 4, 1972, which appears on your law firm's letterhead and which is signed by Mr. Lewis.

Would you particularly read over the bottom of page 1 and the top of page 2 of that document to yourself.

A Yes.

Q Having looked at that document which I have shown you, does it refresh your recollection concerning whether Mr. Gross was making any demands about special treatment?

A Yes.

Q What is your present recollection?

MR. MANDEL: Excuse me. I object to the words "special treatment."

THE COURT: Sustained. That is to form.

Q Making certain demands, what is your recollection, Mr. Bialkin?

A It's my recollection that a snag developed at the end with respect to the terms under which one of the partners, Mr. Gross, or people associated with him, would agree to the arrangements that part of those proposals involved terms which on my instructions Mr. Lewis objected to.

Q You mean he refused to go along with Gross's demand?

A "Refused" is a peremptory word. In a business negotiation, you try to do what you can and make a judgment at the end as to whether the good outweighs the bad.

Q You say "refuse" is a hard word. In the course --

THE COURT: Peremptory word, he said.

Q A peremptory word.

In the course of these negotiations, do you recollect ever having walked out of meetings?

A Yes.

Q That's pretty peremptory, isn't it?

A It was until I got to the door and somebody called me back.

Q In the case of Mr. Gross, you came back --

A I thought they never would.

Q -- you came back, did you not, Mr. Bialkin?

A Yes, sir.

Q And you, on behalf of your clients or your firm on behalf of your clients, signed the transfer agreement; isn't that so?

A Yes, sir. We did, as well as I thought we could do and signed.

Q And in that transfer agreement, were these various classes treated uniformly?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q In the negotiation, what did you try to do about treating the various classes, that is to say, the subordinated lenders, limited partners and the general partners?

MR. MANDEL: We are now --

THE COURT: Sustained.

Q Was there uniformity of treatment as to the various classes in the Newburger, Loeb organization?

THE COURT: Sustained.

MR. GRUTMAN: As to form?

THE COURT: It is. Uniformity of treatment? How does this man know how other people felt they were treated? He is looking out for his client.

MR. GRUTMAN: I will tell you --

THE COURT: I sustain the objection.

Put the question.

BY MR. GRUTMAN:

Q Do you recollect what the general partners received?

MR. MANDEL: There is no foundation, your Honor. Your Honor will remember that Mr. Bialkin testified about generalities.

Now we are talking about actual classes. We are talking about Gross and nobody has mentioned the fact that Gross was a withdrawn party.

MR. GRUTMAN: This is not an objection. This is Mr. Mandel in his mischief again.

THE COURT: This point is well-taken, and your question, Mr. Grutman, is best served by an application of the best evidence rule, which involves bringing in the document.

MR. GRUTMAN: The transfer agreement is in evidence.

THE COURT: That is better than Mr. Bialkin's recollection, good as it might be.

BY MR. GRUTMAN:

Q This is Exhibit 24 in evidence, the transfer agreement.

Have you ever seen that document before?

A Yes, I believe so., If it's the document that was signed, I have seen it. I see a lot of documents.

Q It's the one that was signed.

A Yes.

Q Could you tell us what did the general partners get under that agreement?

THE COURT: Unless there is a foundation, we will go on to something else.

Objection sustained.

MR. GRUTMAN: I am trying to show everybody was treated equally.

THE COURT: The word "equally" means nothing here.

MR. GRUTMAN: Each class was treated alike.

THE COURT: The instrument speaks for itself.

Sustained.

MR. MANDEL: I would like the jury to be

instructed not to take Mr. Grutman's statement that everybody was treated alike as having any probative validity.

THE COURT: For the tenth time, I will tell the jury that questions which are not answered do not contain evidence for you to consider.

MR. MANDEL: Thank you, Judge.

Q I will ask you a question that may obviate the necessity of going over the pages.

Is the treatment that each of the various people comprising the various classes received in that instrument?

A I believe it is, not having read it in four years.

Q Do you have a recollection of what it was that Mr. Gross demanded?

A In all of these cases, it's question of priorities. It's my recollection, although I can't be very specific about it, that his position was that he was entitled to some different or better priority than we among others felt that he would be entitled to by reason of his status in the case, that is, as a partner of Newburger, Loeb.

I haven't reviewed the file of the documents, and I don't know that I can create it for you. I possibly could respond to the question, but I don't think I can giveyou better than that.

Q In the transaction did anybody get any cash?

A I don't recall. It's my belief that nobody did.

Q Nobody got cash?

A What we were concerned about --

THE COURT: Just a minute. Aren't we in the situation hwere that instrument tells what everyone got?

MR. GRUTMAN: That is correct.

THE COURT: Then there is no need to ask that particular question.

MR. GRUTMAN: I am trying to get at the point of what Mr. Gross wanted.

THE COURT: If you stick with that, I will permit you to inquire as to that.

Q Do you recollect whether Mr. Gross was asking to be paid cash?

A I don't recall specifically, I'm sorry.

Q Do you recollect whether anybody was paid cash?

A I am sure that nobody who we considered as junior to ourselves got a penny out of it.

Q Did you think as a subordinated lender that you were senior to a general partner?

MR. MANDEL: Objection to that question.

THE COURT: Overruled. This explains his prior answer.

A Yes.

Q You were senior to a general partner?

A We were senior to every partner, general or limited.

Q Would that include withdrawn general partners?

A It would be my recollection that we took that position.

Q Do you recollect that it was the night of February 11, 1971 when that document was signed?

A I don't recall.

Q Did you know that if the document were not signed on that night that the stock exchange had issued an ultimatum that Newburger, Loeb would be closed down on the morning of February 12th?

MR. MANDEL: I am going to object. I would like to know first if Mr. Bialkin was present at the closing.

MR. GRUTMAN: That has nothing to do with my question.

MR. MANDEL: I got by that very quickly.

Second, what the New York Stock Exchange would do is probably a guessing game unless Mr. Bialkin has documents or specific conversations.

THE COURT: I am going to sustain the objection on two grounds.

One, there is no showing that he was present, and the question is leading,as,to what Mr. Bialkin was aware of on the night of February 11th with regard to the stock exchange's intention.

Would this be a good time to take our mid-afternoon recess?

MR. GRUTMAN: If we can have five minutes, I think I can finish with Mr. Bialkin in about that length of time.

THE COURT: You will be through with your direct examination?

MR. GRUTMAN: Yes.

THE COURT: All right, let's take five minutes.

We will stand in recess.

(Jury left the courtroom)

(Recess)

(In open court - jury present)

BY MR. GRUTMAN:

Q Mr. Bialkin, did you advise your clients to sign the transfer agreement on February 11, 1971?

MR. MANDEL: Objection.

THE COURT: I will sustain the objection at this point until the foundation has been laid.

Q Did you see the final draft of the transfer agreement which was signed on February 11, 1971 before it was executed?

A I don't recall if I saw the final draft. I knew what its contents would be, and I sent my associate to check and examine it, and acting under my instructions he communicated to me whatever problems or factors might have influenced my judgment, and we would have discussed it.

I don't recall whether I was at the final signing if there indeed was a signing.

Q There was a signing on February 11, 1971. You know that your client signed the agreement?

A Yes.

Q Did they do so upon your advice?

MR. MANDEL: I object to that.

MR. GRUTMAN: This is the partner in charge, your Honor.